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Tagore Law Lectures 1942

Calcutta University

THE LAW OF ARBITRATION IN BRITISH INDIA

By

NRIPENDRA NATH SIRCAR

Price Rs. 10/-

Published by
SUBODH KUMAR DE,
22B, School Row, Bhowanipore,
Calcutta.

Printed by
TRIDIBESH BASU, B. A.,
THE K. P. BASU PRINTING WORKS,
11, Mohendra Gossain Lane, Calcutta.

PREFACE

Requested by the authorities of the Calcutta University to deliver the Tagore Law Lectures in 1941 I selected as my subject the *Law of Arbitration in British India*, inasmuch as in the previous year the law was consolidated and alterations were made to remedy many of the defects in the previous law as discovered in their actual application.

I extremely regret that, owing to unforeseen and unavoidable circumstances, I have been unable to revise the lectures after their delivery.

I acknowledge the valuable assistance rendered by Mr. Praphulla Chandra Ghosh, Advocate, in the matter of preparation of the lectures for publication.

5. 12. 42. N. N. SIRCAR

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NATURE, SCOPE AND EXTENT OF ARBITRATION

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LECTURE III

NATURE, SCOPE AND EXTENT OF ARBITRATION (*Continued*)

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LECTURE V

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ABBREVIATIONS IN REFERENCES EXPLAINED

A. C.—Law Reports, Appeal Cases, House of Lords (since 1890).

Ad. & El.—Adolphus and Ellis' Reports, King's Bench and Queen's Bench.

A. L. J.—Allahabad Law Journal.

A. I. R.—All-India Reporter, Nagpur.

A. I. R. (A.)—All-India Reporter, Allahabad Reports.

A. I. R. (B.)—All-India Reporter, Bombay Reports.

A. I. R. (C.)—All-India Reporter, Calcutta Reports.

A. I. R. (L.)—Lahore Reports.

A. I. R. (M.)—All-India Reporter, Madras Reports.

A. I. R. (N.)—All-India Reporter, Nagpur Reports.

All.—Indian Law Reports, Allahabad Series.

Anst.—Anstruther's Reports, Exchequer.

App. Cas.—Law Reports, Appeal Cases, Chancery.

Atk.—Atkyn's Reports, Chancery.

B. & Ad.—Barnewall & Adolphus' Reports.

B. & Ald.—Barnewall & Alderson's Reports.

B. & C.—Barnewall & Creswell's Reports.

Bac. Abr.—Bacon's Abridgment.

Ball. & B.—Ball & Beatty's Reports.

Beav.—Beavan's Reports.

Bing.—Bingham's Reports, Common Pleas.

Bing. (A. C.)—Bingham's New Cases, Common Pleas.

Bom.—Indian Law Reports, Bombay Series.

B. L. R.—Bombay Law Reporter.

Bos. & P.—Bosanquet and Puller's Reports, Common Pleas.

C. & P.—Carrington and Payne's Reports, Nisi Prius.

Cal.—Indian Law Reports, Calcutta Series.

C. B.—Common Bench Reports.

Ch.—Law Reports, Chancery Division, since 1890.

Ch. D.—Law Reports, Chancery Division.

C. L. R.—Common Law Reports.

C. W. N.—Calcutta Weekly Notes.

Char. Cham. Cas.—Charley's Chamber Cases.

C. & F.—Clarke and Finnelly's Reports, House of Lords.

Com. Dig.—Comyns' Digest.

C. P. D.—Law Reports, Common Pleas Division.

D. & L.—Dawson and Lloyd's Mercantile Cases.

Dan. & Ll.—Danson and Lloyd's Mercantile Cases.

DeG. M. & G.—DeGex, Macnaughten and Gordon's Reports.

Dowl.—Dowling's Practice Reports.

Drew.—Drewry's Reports, Chancery.
E. & B.—Ellis and Blackburn's Reports, Queen's Bench.
E. & E.—Ellis and Ellis' Reports, Queen's Bench.
East—East's Reports, King's Bench.
Eq. Cas. Ab.—Abridgment of Cases in Equity.
H. & N.—Hurlstone and Norman's Reports.
I. C.—Indian Cases.
J. P.—Justice of the Peace.
Jur.—Jurist Reports.
K. & J.—Kay and Johnson's Reports.
K. B. (preceded by date)—Law Reports, King's Bench Division, since 1890.
Lah.—Indian Law Reports, Lahore Series.
L. J. K. B.—Law Journal, King's Bench.
L. J. Q. B.—Law Journal, Queen's Bench.
L. T.—Law Times Reports (1859).
M. & S.—Maule and Selwyn's Reports.
M. & W.—Meeson and Welsby's Reports, Exch.
Mad.—Indian Law Reports, Madras Series.
Madd.—Maddock's Reports, Chancery.
Macq.—Macqueen's Scottish Appeal, House of Lords.
M'Clel. & Yo.—M'Cloland and Younge's Reports, Exch.
Meriv.—Merivale's Reports, Chancery.
Moo. & Rob.—Moody and Robinson's Reports, Nisi Prius.
My. & Cr.—Mylne and Craig's Reports, Chancery.
My. & K.—Mylne and Keen's Reports, Chancery.
P.—Law Reports, Probate, Divorce and Admiralty Division.
Pat. L. J.—Patna Law Journal.
Q. B. D.—Law Reports, Queen's Bench Division.
Roll. Abr.—Rolle's Abridgment of the Common Law,
Ry. & Mo.—Ryson and Moody's Reports, Nisi Prius.
Salk.—Salkeld's Reports, King's Bench.
Sc. L. R.—Scottish Law Reporter.
Sim, & Stu.—Simons and Stuart's Reports, Chancery.
Sol. Jo.—Solicitors' Journal.
Stra.—Strange's Reports.
T. L. R.—The Times Law Reports.
Taunt.—Taunton's Reports, Common Pleas.
Tyr.—Tyrwhitt's Reports, Exch.
Ves. Jun.—Vesey Jun's Reports, Chancery.
Willes.—Willes' Reports, Common Pleas.

THE LAW OF ARBITRATION IN BRITISH INDIA

LECTURE I

INTRODUCTORY

The law of arbitration, like many other branches of law, has evolved out of the result of the difficulties and facilities experienced by Courts administering justice, and by litigants and lawyers in their attempts to avoid the Courts of law and to have differences adjusted by domestic tribunals.

Arbitration law evolved from difficulties and facilities of Courts, litigants and lawyers to have disputes settled by domestic tribunals.

In the picturesque language of Sir Rash Behary Ghose—"Everyone of us, it has been said, has all the centuries in him, though their operation may be latent and obscure. And this is equally true of all human institutions in which the leafage, the blossom, and the fruits may often be traced to the humble roots out of which they have grown. .....In a word, our institutions like the organic world obey the law of evolution by which they are gradually transmuted."

Our institutions like the organic world obey the law of evolution by which they are generally transmuted.

It is desirable to offer an explanation why it is not intended to laboriously explore the hoary past for getting at the "humble roots" of the Law of Arbitration in India, and it consists not merely in the fact that the caption

Arbitration law gathered progressive vigour in transplantation from English to Indian soil.

of these lectures is *the Law of Arbitration in British India*, but it will be found that throughout the relevant period, the Law of Arbitration may be represented by a fairly mature plant, progressively gathering increased vigour, transplanted from the English to the Indian soil. With the lopping off of branches or the engrafting of new ones on the English plant, operations on similar lines have been performed in British India, and during later legislation, little attention has been paid to the "humble roots" of the Law of Arbitration as it flourished in Hindu or Muslim India.

References made to Hindu or Muslim times are for indicating such avenues as will help in carrying on investigation into the subject.

By this statement it is not intended to imply that the law prevailing in British India has suffered from the course which has been adopted for its development. On the other hand, the law in England had the benefit of recorded pronouncements of Judges, as found in English reports from at least the seventeenth century, and being based on English law, the law in British India has received the full benefit of the working of the law in England. It has been, I trust, made abundantly clear that no attempt worth the name will be made to investigate the Law of Arbitration and its working in Hindu and Muslim India. Such brief references as are going to be made are intended to fulfil the sole purpose of indicating some of the avenues which may be explored for carrying on such enquiry.

Enquirer into the subject in Hindu Law confronted with conflicting statements.

The plodding enquirer into Hindu Law will find himself sometimes up against reconciling apparently conflicting statements in our ancient books, of which the authorship rests on traditions, and the dates of which cannot be fixed

with reasonable certainty even within a few centuries.

For those who have the leisure and the desire to investigate the nature and condition of the Law of Arbitration in ancient times in India and elsewhere, the path to a certain extent has been cleared and indicated by the laborious researches of learned explorers. They will find ample materials in learned works, like those of Mr. K. P. Jayaswal's "Hindu Polity", and the several publications of Mr. K. R. R. Sastry of Allahabad University, e.g., "Guilds in Ancient India", in Mahamahopadhyay Sir Ganganath Jha's "Hindu Law in its Sources", in Sir Frederick Pollock's "Expansion of the Common Law" and "Primitive Law" in the '*Evolution of Law Series*', in the Institutes of Manu, in Kautilya's Arthashastra, and in other treatises; and in articles in the magazines, too numerous even to be mentioned and quite unnecessary when the avowed object is to leave such investigation severely alone.

Accounts of Arbitration law in ancient India found in researches of eminent jurists and scholars, Manu's Institutes, Kautilya's Arthashastra, learned treaties and articles on the subject in journals.

Again, the patient worker, not cramped for time, will be rewarded by discovering descriptions in Sumerian inscriptions of about 4000 B.C. of settlement of international disputes by arbitration, or of private disputes in Homer's *Illiad*. From the *Peace Foundation Pamphlet*, Vol. VI, will be found innumerable cases of settlement of international disputes, between periods going back to about 200 B. C. and ending with the eighteenth century.

Sumerian inscriptions, Homer's Illiad, Peace Foundation Pamphlet, Vol. VI, furnish evidences of settlement by arbitration from before Christian era.

The basic idea of arbitration was then, as it is to-day, the settlement of differences by tribunal chosen by the parties themselves, whose

Basic idea of arbitration has been settlement of

differences by tribunals chosen by parties themselves.

decision is to be accepted as final and conclusive between themselves. This does not, however, mean that in ancient times there were no means of revising in some cases the awards of arbitrators.

In ancient India there were three grades of arbitrators, the *Puga*, the *Sreni* and the *Kula*, who, formed different degrees of the *Panchayet*, not being a jury or a village tribunal.

Even in such remote times as Hindu India there were different grades of arbitrators, e.g., the *Puga*, or a board of persons belonging to different sects and tribes, but residents of the same locality, the *Sreni*, or assemblies and meetings of tradesmen and artisans belonging to different tribes, but having some kind of connection with one another through the profession practised by them, and the *Kula*, or meetings of persons connected by family ties. According to Colebrooke these three assemblies were different degrees of *Panchayet*, which was not in the nature of a jury or village tribunal, but a system of arbitration, subordinate to and under control of the regular Courts of Justice. It is not within the scope of these lectures to enquire into the correctness of this conclusion.

Despite codification of Arbitration law, village disputes are still decided by *Panchayets*, who, unhampered by technicalities of law and procedure, are dominated by local prejudices and factional bias.

Though the law has been codified in British India, yet even today many a dispute in the village is settled by the mediation or arbitration of the elders of the village. These mediations are done in an informal way, the *Panchayets* not being troubled with technicalities of procedure or rules of evidence. This system has one advantage of inestimable value, namely, that a witness from the village confronted by co-villagers finds it more difficult to come out with a lying story, than when placed in the witness-box in a Court of Justice, away from the eyes of those who have a fairly good idea of the true state of affairs.

Though this advantage is lost in a trial in a Court, yet one cannot shut one's eyes to the notorious fact that there is hardly a village free from local factions, and the *Panchayets*, who absorb local prejudices and factional bias, are subject to disadvantages from which the Courts are free. Harsh, unfair and unjust decisions of village *Panchayets* in matters relating to caste are by no means unknown.

Decisions of *Panchayets* no longer considered suited to the more sophisticated life and complicated transactions of modern life.

The simple and more or less informal decisions of *Panchayets* are, however, little suited to the more sophisticated life and complicated transactions with which we have to deal in the present times, and whatever criticisms can be offered and comments made on the codified law in British India, there can be no doubt that it serves a great purpose, and is of immense benefit to those who come under the necessity of having their differences adjudged by a tribunal chosen by themselves.

Transactions of the Royal Asiatic Society, 1828, Vol. II, contain summary of Arbitration law and procedure before advent of the British.

Those who are interested in knowing the details of the system, of the different grades of arbitrators, of appeals in certain cases from the awards of a lower grade of arbitrators to arbitrators of a higher grade, and other connected matters, just before the advent of the British, will find a brief summary in the second volume of the *Transactions of the Royal Asiatic Society, 1828.*

British period in Arbitration law begins with Lord Cornwallis with 24 Geo. III C. 25 supplemented by his attempt to frame rules

Coming to the British period, it will suffice to start with the period of Lord Cornwallis and to give a concise account of the development of the Law of Arbitration in subsequent times. Before the arrival of Lord Cornwallis to India in 1786, Parliament had passed a statute, viz., 24 Geo. III, Ch. 25, by which was established a

for administration of justice founded on ancient law and local usages.

Board of Commissioners for Indian affairs. Lord Cornwallis in 1787 proceeded to give effect to the directions he had received in England, viz., to frame rules for administration of justice founded on the ancient law and local usages prevailing in India.

Regulations before Cornwallis, instead of abolishing *Panchayets*, recommended parties to submit their disputes in certain matters to arbitration.

The Bengal Regulations, even before the time of Lord Cornwallis, did not try to exterminate the system of *Panchayets* then prevailing in the country, and, on the other hand, in connection with certain matters like accounts, the Regulations of 1772 expressly recommended to the parties to submit the decision of their disputes "to arbitration, the award of which shall become a decree of Court."

Distinct attempts to enlarge scope of arbitration were made by Bengal Regulations of 1780 and 1781.

Similar attempts with a tendency to enlarge the scope of arbitration were made in the Bengal Regulations of 1780 and 1781. The common feature of all these Regulations was the recommendation for arbitration, and the spirit in which these laws were enacted can best be illustrated by the following quotations from the Regulation of 1781, viz.—(1) "The Judge do recommend, and so far as he can without compulsion prevail on the parties, to submit to the arbitration of one person to be mutually agreed upon by the parties", and (2) "No award of any arbitrator or arbitrators be set aside, except upon full proof, made by oath of two credible witnesses, that the arbitrators had been guilty of gross corruption or partiality, in the cause in which they had made their award."

Amalgamation of offices of Collector and

During the time of Lord Cornwallis the offices of Collector and Judge were amalgamated, and with the exception of the Civil Courts in

Dacca, Murshidabad and Patna, in each District an European Civil Servant discharged the three-fold jurisdictions of Collector, Magistrate and Judge. For the exercise of his powers, different Regulations were drawn up applicable to his three different jurisdictions. This state of affairs came into existence in 1787, and in June of the same year, Regulations came into existence for the administration of justice, and the Courts were empowered to refer certain classes of suits to the arbitration of one person. The Courts were besides empowered to order such references with the consent of all the parties concerned, and as yet there was no provision for reference to arbitration where a party objected to this course being followed.

Judge during Lord Cornwallis' regime in 1787 and excepting Civil Courts in Dacca, Murshidabad and Patna, three-fold jurisdictions of Collector, Magistrate and Judge discharged by one single European Officer, Courts being empowered to refer certain suits to arbitration of one person with consent of parties.

The Regulations of 1787 were drawn up in a very unsatisfactory manner and were full of such serious defects and omissions that their usefulness turned out to be extremely limited. While the Regulations included provision for arbitration with consent of parties, there were no provisions for consequences of awards not being made in time, or for the situation when arbitrators differed in their opinions.

Regulations of 1787 unsatisfactory in arbitration provisions, because of no provisions for awards made not in time or when arbitrators differed.

After a lapse of about five years, the Regulation XVI of 1793 was passed, which was far more comprehensive than its predecessors. It is not necessary to refer to all the provisions of this Regulation, but it may be mentioned that a difference was made in respect of suits of value not exceeding *sicca* Rs. 200/- and those in which the value exceeded that amount. In suits for accounts, partnership-debts, non-performance of contracts, etc., in which the valua-

Regulation XVI of 1793, more comprehensive than its predecessors, provided that in suits for accounts, partnership—debts, non-performance of contracts, where valuation exceeded 200 *sicca* rupees,

Courts could refer dispute to one arbitrator with consent of parties and laid down specific provisions in matters ancillary thereto.

tion exceeded two hundred *sicca* rupees, the Courts could, with consent of parties, refer the suit to the decision of one arbitrator. There were provisions relating to procedure on parties consenting to arbitration, for delivery of award within appointed time, for extension of time, for selection of the arbitrator and umpire, for making the award a rule of Court, for prohibition of Vakils of parties acting as arbitrators, for execution of Arbitration Bonds, for transmission of papers to the arbitrator, for procedure before arbitrators and for other matters, but as they are of historic interest only, it is unnecessary to go into those matters in detail. The prohibition regarding Vakils was removed by a subsequent Regulation.

Party to examine two credible witnesses about corruption or partiality of arbitrator.

In order to have an award set aside it was necessary for the party desirous of doing so, to satisfy the Court by examining two credible witnesses prepared to depose that the arbitrator had been guilty of gross corruption or partiality.

Regulation XVI of 1793 extended by 1795 & 1803 Regulations.

This Regulation, viz., XVI of 1793, was extended by subsequent Regulations of 1795 and 1803 to Benares and to the Provinces ceded by Nawab Vazeer to the East India Company.

So far there existed no Regulations providing for arbitration in disputes about land. Regulation VI of 1813 laid down such provision for the first time.

While it is not intended to discuss those Regulations at any length, attention may be drawn to the fact that there was so far no Regulation providing for arbitration in case of disputes with reference to land. It was only in 1813, by Regulation VI of that year, that the provisions of Regulation XVI of 1793 were extended to suits relating to land. Moreover, parties were given the right of getting the help of Court in case of private arbitration

relating to land disputes. Any party could make a summary application to the Dewani Adalat, which after hearing the opposite party, if he intended to show cause, could order the award to be summarily executed as a decree of a Court. The application had to be made within six months from the date of the award, and the Court had no power to extend the time.

Passing reference may be made to the Madras Regulation IV of 1816, which gave certain powers for calling in *Panchayets* for settling disputes It is considered unnecessary to refer to the particulars of these Regulations, or Bengal Regulation XXII of 1816, whereby Magistrates in Bengal were empowered to appoint *Panchayets* for regulating and revising annually the rates to be levied for maintaining Chaukidars and also for appointing Chaukidars subject to the Magistrate's approval.

Madras Regulation IV of 1816 provided for *Panchayets* to settle disputes, while Bengal Regulation XXII of same year provided for *Panchayets* to regulate appointment and maintenance of *Choukidars.*

The object of another Regulation, namely, Madras Regulation V of 1816, was to encourage awards by village *Panchayets*, and the machinery was provided for working out the scheme with the help of village Munsiffs, and a villager refusing to serve as one of a *Panchayet* was liable to fine to be imposed by the village Munsiff. The village Munsiff had no power of annulling an award, but the machinery provided was by complaint to the Zilla Judge, who was authorised to submit the proceedings with his opinion to the Provincial Court of Appeal, which could set aside the award on proof of corruption or gross partiality of arbitrators, although no appeal was permitted from the decision embodied in the award. When District Munsiffs were

Madras Regulation V of 1816 encouraged awards by village *Panchayets* and provided machinery for working out the scheme.

created by the Madras Regulation VII of 1816, they were given powers analogous to those given to village Munsiffs.

Bengal Regulation VII of 1822 extended scheme of arbitration from Civil Courts to Land Revenue Courts.

In Bengal in addition to Regulation XXII of 1816 already noticed, there was enacted later Regulation VII of 1822, which extended the scheme of arbitration from Civil Courts to Courts of Land Revenue. Without recapitulation of the elaborate provisions contained in that Regulation, it will suffice to note that the Regulation directed Collectors to try their best to induce parties to refer disputes to arbitration, like what was enjoined on Civil Courts by other Regulations.

Bombay and Madras also passed enactments encouraging arbitration by Regulations IV and VII of 1827.

As in Madras, so in Bombay, enactments with the view of encouraging arbitration were passed in 1827, namely,—Regulations IV and VII. The idea underlying the Bombay Regulation IV of 1827 was to enable the European Judges presiding in Civil Courts to secure the help of Indians by referring to them the whole suit, or particular points involved in it, and this scheme was extended to Bengal by Regulation VI of 1832.

Regulation VII of 1822 for settlement of Land Revenue amplified by Regulation IX of 1833.

The provisions for arbitration in connection with settlement of Land Revenue contained in the Regulation already mentioned, viz.—VII of 1822, were further amplified by Bengal Regulation IX of 1833.

3 and 4 Wm. IV C. 85 (1833) establishing Legislative Council for India did away with

We are now brought to the year 1833 when Parliament enacted statutes 3 & 4 Will. IV, Ch. 85 establishing a Legislative Council for India. In spite of the establishment of the Legislative Council, the Regulations of Bengal,

Madras and Bombay, previously mentioned, continued in operation till the year 1859.

the regime of Parliamentary Regulations.

The year 1859 is an important year in the history of the Law of Arbitration in British India, as in that year was enacted Act VIII of 1859, which codified the procedure of Civil Courts (except those established by Royal Charter). Secs. 312 to 325 dealt with arbitration between parties to a suit, while Secs. 326 and 327 dealt with arbitration without the intervention of a Court.

1859 important year in Indian arbitration legislation. Act VIII of that year codified Civil Procedure and provided for arbitration between parties.

Act VIII of 1859 was followed by later Codes relating to Civil Procedure, viz.—Act X of 1877 and Act XIV of 1882, and no such change relating to the Law of Arbitration was introduced by these two later Codes of Civil Procedure as compared to Act VIII of 1859 as deserves to be especially mentioned at this stage, where we are concerned with only a concise outline of the history of the Law of Arbitration.

Act X of 1877 and Act XIV of 1882 introducing modifications in existing civil codes made no change in arbitration provisions.

The next step was the Indian Arbitration Act IX of 1899, about which much will be said later, but at this stage it will suffice to point out that this Act applied by reason of Sec. 2 "only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town". By Sec. 23 similar provision was made for Rangoon. The Local Government was given power by the provisions of Sec. 2 to extend the Act to other areas, but this power was never exercised. For what suits could with or without leave be so instituted, reference must be made to the Charters of the High Court and enactments

India Arbitration Act IX of 1899 was first substantive law on the subject being mainly confined in operation to Presidency towns, while subsequent legislation of 1940 had application to whole of India.

relating to Presidency Small Causes Courts; but as the new Arbitration Act of 1940 applies to the whole of British India, it will be unnecessary to burden the lecture here with a discussion of the topic relating to suits capable of being instituted in Presidency Towns.

Arbitration law limited so far to disputes which had arisen widened in its scope in Arbitration Act IX of 1899.

While the Indian Arbitration Act IX of 1899 had thus a limited area of applicability, it widened the scope of arbitration in another direction. Up to 1899 arbitration was limited to disputes which had arisen, but Act IX of 1899 defined "submission" as meaning "a written agreement to submit present or future differences to arbitration."

Civil Procedure Code 1908, instead of making any substantial change in provisions relating to arbitration, only put relevant sections in separate schedule as Special Committee thereon hoped to have comprehensive legislation on the subject in near future.

The Civil Procedure Code now in force, viz., Act V of 1908, did not make any substantial change in the provisions relating to arbitration to be found in the earlier Codes, but put the sections relating to arbitration in a schedule to the Act, for reasons expressed in the report of the Special Committee, namely.—"We have determined therefore to leave the arbitration clauses much as they are in the present Code: but we have placed them in a schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act". What kind of distant date the Committee had in mind is not known, but the Government of India started an investigation as the result of representations made by various organisations, including the Associated Chambers of Commerce of India. Before the investigations were completed, the Civil Justice Committee presided over by Mr. Justice Rankin, now the Right Honourable Sir George Rankin, made their

suggestions for the modification of the Law of Arbitration in 1924-25.

Government of India taking their initiative from English Act of 1934 set up Special Committee and brought about Arbitration Act of 1940.

The Indian Arbitration Act of 1899 being based on the English Act of 1889, and in England, the Mackinnon Committee on the Law of Arbitration having made its report in 1927, the Government of India proposed to wait till the expected new English Act had been placed on the Statute-Book, which was done in May 1934. The Government of India took the matter up after that date, and in 1938 selected Mr. Ratan Mohan Chatterjee, Attorney-at-Law, as Special Officer, in connection with the proposed change in the Law of Arbitration. The present law, as embodied in the Arbitration Act of 1940, came into force on the 1st July 1940, saving from its operation references then pending.

Just as the Indian Arbitration Act of 1899 was based on the English Act of 1889, so the Indian Arbitration Act of 1940 is based on the English Act of 1934.

For full benefit from Arbitration law, or for the matter of that any other law, parties must always be reasonably helpful and arbitrators are to display strong common-sense and firmness.

Having come to the end of the outline of the history of the Law of Arbitration in British India, and before entering into a comparison of the state of the Law of Arbitration in England and in British India respectively in the period between the advent of the British and the present times, which will be done later, the obvious truth may be stated that whether full benefit can be derived by parties interested from this law, or any other law, depends to a large extent on the conduct of the parties and the spirit of reasonable helpfulness, or cantankerous obstruction, with which proceedings are conducted before arbitrators. Instances are not rare of

parties, or some of them, having been responsible for taking up an unreasonable attitude, or of being completely incapable of give and take, leading to a prolongation of proceedings and waste of time and money. Not only the parties, but arbitrators sometimes contribute to make the proceedings unsatisfactory, by lack of a reasonable amount of firmness and display of common sense—a failing by no means confined to domestic tribunals.

Arbitrators are in the absence of special powers to be guided by technicalities of law and procedure and not to be influenced by what they consider fair or equitable or just or reasonable.

In the popular mind, not infrequently, the belief prevails that arbitrator's hands are not tied by technicalities of law or procedure. This is an erroneous idea, and unless the arbitration agreement gives the arbitrator special or extraordinary powers, he will be unwise in departing from fundamental legal principles which have been established for the due administration of justice. The latitude given to arbitrators will be discussed at some length in its proper place, but it should be taken to be the law that in the absence of special powers conferred on the arbitrator, he is under obligation to decide matters referred to him according to the legal rights of the parties, and not according to what he may consider to be fair or equitable, or just and reasonable : *Jager* v. *Tolme*, (1916) 1 K. B. 939 ; *Aubert* v. *Maze*, (1801) 2 B. & P. 371 ; *In re Badger*, (1819) 2 B. & A. 691 ; *Blennerhasset* v. *Day*, (1811) 2 Ball. & B. 104.

There is no reason in complaint that as result of the applicability of strict legal principles commercial

Complaint has sometimes been made that, as the result of the applicability of strict legal principles, merchants and traders may find that what they understood to be the effect of a contract has been negatived by such application. Indeed, Scrutton, L. J. said : "But I regret that

in many commercial matters, the English Law and the practice of commercial men are getting wider apart, with the result that commercial business is leaving the courts and is being decided by commercial arbitrators with infrequent reference to the courts." *Hillas and Co. Ltd.* v. *Arcos Ltd.*, 147 L. T. at p. 506. It will be seen, however, that Lord Thankerton, delivering judgment in appeal from the decision of Scrutton, L. J., was to some extent influenced by the understanding of commercial men, as he stated :— "While I have had considerable doubt on this question of construction, I am affected by the consideration that the contract is a commercial one and that the parties undoubtedly thought that they had concluded a contract". (at p. 513). With all respect to such an eminent Judge as Scrutton, L. J., it may be said that the conclusion which he has drawn that business is leaving the Courts, even if it were correct, is by no means an alarming one, because it is desirable that commercial disputes should be settled by arbitration of those who have experience of commercial transactions and of the practice followed in such matters.

interests will suffer as to the effect of their contracts.

The English Courts started with violent prejudice against arbitrations as attempts to oust the jurisdiction of King's Courts, and at Common Law the authority of an arbitrator might, at any time before award, could be revoked at the pleasure of any of the parties to the agreement for arbitration, even where the submission was in writing, by bond or deed, by Judge's order or by rule of Court. Where the submission had been made a rule of Court, the party revoking could be punished by attachment for contempt :

At first English Courts felt greatly prejudiced against arbitrations, so that at Common Law authority of arbitrator could be revoked at any time before award at desire of any of the parties

to agreement till Common Law Procedure Act of 1854 set matters somewhat right.

Green v. *Pole*, (1830) 6 Bing. 443, or a suit could be brought against the party revoking : *Skee* v. *Coxon*, (1830) 10 B. & C. 483. But all the same at Common Law power remained for a party to revoke the submission at his pleasure. Even where the agreement expressly made the submission irrevocable, that did not take away the power of revocation. The remedy of the aggrieved party lay in suing for breach of covenant or agreement, which was a very unsatisfactory form of relief. Without going too minutely into the matter, it may be stated that by Common Law Procedure Act of 1854 it was made possible to prevent revocation of submission in certain cases.

English legislation and decisions moved towards helping arbitration through 9 & 10 Wm. III C. 15 (1698), 3 & 4 Wm. IV C 42 (1833), Common Law Procedure Act 1854 and Arbitration Acts 1889 and 1934.

The English legislation and the English decisions have consistently moved towards removing difficulties in the way of arbitration, and it is from quite a long time that the movement has been progressing towards encouragement of arbitration. This move can be traced from 9 & 10 Wm. III., C. 15 in 1698 which tried to help arbitration and 3 & 4 Wm. IV., C. 42 (1833), leading to the Common Law Procedure Act, of 1854, the English Arbitration Act of 1889 and ending with the English Arbitration Act of 1934.

In India early British administrators and Judges had to depend upon *Panchayets* for settlement of disputes being themselves in unfamiliar surroundings and amidst strange

As regards British India, the early English administrators and judges had to take upon themselves the task of introducing a judicial system, in unfamiliar surroundings, and for persons governed by equally unfamiliar systems of jurisprudence, and it was thus to be expected that they would rely on Indian *Panchayets* and arbitrators, a point which may be brought home by taking the example of the Bombay Regula-

tion of 1827, which has been previously mentioned. With a view to help the European officers presiding over Courts of Law in deciding civil suits and appeals, it was provided that in the trial of a suit such officers could get the help of "respectable native gentlemen" and refer to the *Panchayet* of such gentlemen, either the whole controversy in the suit or any particular point or points involved in it. Instead of making a reference of either kind the officer could constitute two or more respectable Indians assessors of the Court with a view "to have the benefit of their advice and observations particularly in the examination of witnesses." The *Panchayet* could have been used in a third way, namely, by being employed as Jury for suggesting points to be investigated and expressing their opinion on matters put to them.

peoples as Bombay Regulation of 1827 amply bears out.

This system must have been found to be useful, if not almost indispensable, to the early European judges, which explains why the Bombay scheme was extended to Bengal in 1832. Nor was the procedure of arbitration confined to the purpose of helping the European officers, a matter which is made clear by the Madras Regulation of 1816, authorising District Munsiffs and Village Munsiffs to take the help of *Panchayets*, or the Bengal Regulations of 1813 and 1814 providing for reference of suits to arbitrators by Civil Courts in which such suits had been instituted.

System of calling in assistance of *Panchayets* was found so successful that Bombay Regulation was extended to Bengal in 1832, Madras having regulated likewise earlier in 1816.

Reference has been made, by way of example, to the Regulations of 1813, 1814, 1827 and 1832, for showing what use was being made in India of arbitration during those times, while in England, as previously mentioned, arbitration

Reference to Regulations is intended for showing what use was being made in India

of arbitration during those times, while arbitration was governed in England by Common Law and Statute of 1698 till the matter was set at rest there in 1833 by 3 and 4 Wm. IV C. 42.

was being governed by the Common Law and the Statute of 1698—9 & 10 Wm. III. C. 15, which provided that "it shall and may be lawful, for all Traders and others desiring to end any controversy, suit or quarrel....for which there is no other remedy, but by personal action in suit or equity, by arbitration to agree that their submission of their suit to the award, or umpirage of any person or persons should be made a rule of any of His Majesty's Courts of Record, which the parties shall choose." It was only in 1832, that is, after the Regulations under discussion here, that Parliament enacted 3 & 4 Wm. IV., C. 42, which made irrevocable a submission which had been made a rule of Court—a fact to which passing reference has already been made.

Great jealousy originally prevailed in England in permitting questions concerning real property to be determined by arbitration, but questions relating to land and title thereto formed subject-matter of arbitration in pre-British and early British periods.

Another difference between the positions in England and early British India will be manifest from the following quotation from *Russell on Arbitration and Award*, 13th Ed., p. 1 :—'There was formerly great jealousy in permitting questions relating to the title to real property to be determined by arbitration (see Com. Dig. Arb. D. 3 ; Rolle, Ab. Arb. B. 14, E 2, F. 9, K 15, V)." The technicalities surrounding devolution and conveyance of real property which had their "origin in feudal principles" (Black. Com. III, 21st Ed., p. 16) never prevailed in India, and both in pre-British and early British periods, questions relating to land and title thereto used to be the subject-matter of arbitration.

English traditions being responsible for earliest Indian Regulations, arbitration

The English traditions were responsible for the earliest Regulations in British India, like the Bengal Regulations of 1772, 1780, 1781 and 1793, being confined to Courts recommending arbitration in matters like disputed accounts, and

disputes as to money or personal property, no mention being made of disputes relating to land, but, as has been seen already, certainly from 1813, Regulations were passed from time to time extending arbitration to disputes respecting rights in land.

confined to disputes of accounts and money or personal property, land disputes coming in by Regulation of 1813.

In England there was no legislation after (1833), 3 & 4 Wm. IV., C. 42, till 1854, when the Common Law Procedure Act was placed on the Statute-Book, while in India, in 1859, by the Civil Procedure Code of the year, provision was made for references to arbitration in pending suits as well as references to arbitration without intervention of Court. While the Code of 1859 was repealed in 1877 by Act X of that year, there was no change in the provisions relating to arbitration, and the Civil Procedure Code of 1882 substantially reproduced the provisions contained in the Code of 1859.

After arbitration legislation of 1833 no English legislation till 1854. In India C. P. Code 1859 enacted for arbitration in pending suits and for that without intervention of Courts, the Code of 1882 substantially reproduced provisions of the Code of 1859.

The subsequent statutes, viz.—in India the Civil Procedure Code of 1908, the Indian Arbitration Acts of 1899 and 1940, and in England, the Arbitration Acts of 1889 and 1934, have already been referred to, and no further statements about these later legislations need be made here, as they will come up repeatedly for discussion, because many of the cases decided by Courts under their provisions are still good law and effective authorities.

Subsequent Indian legislation on arbitration contained in C. P. Code 1908 and in Arbitration Acts 1899 and 1940.

The Law of Arbitration has been and is being extended, both in England and British India, in another direction, inasmuch as more and more statutes are coming into existence, which provide that disputes concerning subject-matters of such statutes may or must be determined by arbitration. The English examples are

How Arbitration law has extended in England will be evident

from the specific provisions made therefor in numerous Acts.

to be found in Land Clauses Acts, now replaced by the Acquisition of Land (Assessment and Compensation) Act, 1919, in the Companies Clauses Act, 1845, the Companies Consolidation Act, 1908, the Companies Act, 1929, in different Acts relating to Railways and Light Railways, in the Public Health Act, 1875, the Electric Lighting Acts, the Factory and Workshops Acts, the Friendly Societies Acts, the Conciliation Act, 1896 and the Building Societies Act. How numerous are these Acts will be realised from a glance at the very long list of "Principal Statutes containing provisions for reference to arbitration" set out at pages 17 and 18 of *Russel on Arbitration and Award*, 13th. Ed.

How Arbitration law has extended in India will be evident from the specific provisions therefor in numerous Acts.

As Indian examples, reference may be made to the Indian Electricity Act IX of 1910, the Indian Companies Act (Act VII) of 1913, the Bombay Cotton Contract Act IV of 1932, the Co-operative Societies Act II of 1912, the Punjab Land Revenue Act XVII of 1887, the Bombay Co-operative Societies Act VII of 1925, the Bengal Settlement Regulation VII of 1822, the Bengal Land Revenue Settlement and Deputy Collectors Regulation IX of 1833, the Religious Endowment Act XX of 1863, the Cantonments Act II of 1924, the Trade Disputes Act VII of 1929, the Land Acquisition Act I of 1894, the Bengal Embankment Act XXXII of 1885, the Deccan Agriculturists' Relief Act XVII of 1879, the United Provinces Land Revenue Act III of 1901, the Estates Partition Act (Bengal Act V) of 1897 and various other Statutes, an exhaustive list of which will serve no useful purpose.

LECTURE II

NATURE, SCOPE AND EXTENT OF ARBITRATION

Settlement by arbitration based on agreement of parties.

The foundation for settlement of a dispute by arbitration must necessarily be based on an agreement between the parties for that purpose, unless it is a statutory arbitration.

English Act 1889 and Indian Act 1899 used 'submission'; English Act 1934 and Indian Act 1940 use 'arbitration agreement'.

In the Indian Arbitration Act of 1899, sec. 4(*b*) and in the English Act of 1889, sec. 27, the word "submission" has been used, whereas in the later English Act of 1934 and in the Indian Arbitration Act of 1940, the expression used is "arbitration agreement."

What 'submission' in older Acts meant.

The "submission", as defined in the older Acts referred to, meant "written agreement to submit present or future differences to arbitration, whether an arbitrator is mentioned or not."

Indian Arbitration Act 1899 makes 'submission' irrevocable but by leave of Court.

Sec. 5 of the Indian Arbitration Act of 1899 proceeded to state that "submission, unless a different intention is expressed therein, shall be irrevocable except by the leave of the Court." The language is the same in sec. 1 of the English Act of 1889, except that the latter has the additional words "and shall have the same effect in all respects as if it had been an order of Court." The object of pointing out similarity between the Indian and English Acts is to bring out the applicability of English rulings relating to the subject-matter of "submission" and "arbitration agreement" to India.

"Submission" is a personal covenant, it is an agreement ; but the expression "submission shall be irrevocable" is not free from ambiguity.

While 'submission' is personal covenant and an agreement, the expression 'submission shall be irrevocable' is ambiguous.

This was pointed out as early as 1890, that is, within one year of the passing of the English Act of 1889, *in re Smith* and *Service and Nelson & Sons*: 25 Q. B. D., 545, in which Bowen, L. J. said: "I may remark that the word "submission" and the words "revocation of submission" are words which have been used with some inexactitude, both in the cases and in the text-books. There may be an agreement to refer generally without naming the arbitrators; such an agreement was always irrevocable, and an action would always lie for its breach, although the Court could not compel either of the parties to proceed under it. There may be an agreement to clothe a particular arbitrator with authority, and if one of the parties revoked that particular arbitrator's authority, and refused to submit to him, he could not be compelled to proceed. In such a case, though not with exactitude, one might probably talk of revocation of the submission and of the submission as revocable, although it was in truth a revocation of the authority of that arbitrator. The difficulty has arisen because in this Act submission is defined as a written agreement to submit to arbitration whether an arbitrator is named or not. Exacter language was used by the legislature in framing 3 & 4 Wm. 4, c. 32, s. 39, which accordingly provides that the power and authority of an appointed arbitrator when the submission has been made a rule of Court shall not be revocable. That shews what is the true thing that is revoked; the party does not revoke the agreement to refer, but revokes the authority he has given to the arbitrator." (at p. 553)

This matter has been very lucidly explained

by Fletcher-Moulton, L. J. in *Doleman* v. *Ossett Corporation* : (1912) 3 K. B. 257. His Lordship, after pointing out that "by common law a submission to a particular arbitrator was revocable at the will of either party, unless it had been a rule of Court" also proceeds to state : "But this was in the nature of a recission. Such a revocation involved the breach of no contract, and gave rise to no right of damages. It was merely an exercise of a legal power to revoke which was implied in a submission. On the other hand (as was pointed out by Bowen, L. J. in 25 Q. B. D., 545) an arbitration clause could no more be revoked than could any other clause of a contract. Like any other contractual obligation it could be broken, and thereby a claim to damages would arise. But there was no right to rescind such a contract or contractual obligation. Sec. 1 of the Arbitration Act, 1889, relates merely to the right to revoke a submission." The Arbitration Act of 1940 has followed the English Act of 1934 in defining "arbitration agreement" as meaning "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." But both these Acts have avoided the use of the word "submission."

Fletcher-Moulton, L.J. lucidly explains the point in *Doleman* v. *Ossett Corpn.* in 3 K. B. 257.

'Submission irrevocable except by leave of Court' unnecessary because 'submission' with ambiguity removed.

It is no longer necessary to say that a submission will be irrevocable except by leave of Court, as the word "submission" has been removed and the ambiguity pointed out by Bowen, L. J. is not capable of arising under the new definition.

Although 'arbitration agreement' cannot be revoked by party yet

It has been pointed out that an arbitration agreement like any other agreement cannot be revoked or rescinded by one party, but this does

Court's power to supersede arbitration left untouched by secs. 15 and 25.

not touch the power of Court to supersede arbitration in the circumstances stated, for instance, in secs. 19 and 25.

Oral Agreement for Arbitration or Oral submission

'Submission' will continue to be used in referring to English decisions before 1934 and Indian decisions prior to 1940.

If the ambiguity discussed earlier is kept in mind, when consideration of aspect leading to the ambiguity is immaterial, there can be no objection in continuing to use the word "submission", inasmuch as there will be occasion to refer to decisions in England prior to 1934, and in India before 1940, and in neither of these statutes governing these decisions has the expression "arbitration agreement" been used.

It has been seen that the definition requires a "written agreement" and the matter to be considered now is the situation which arises under an agreement for arbitration which is not in writing.

Inasmuch as 'written agreement' is insisted upon, situation without an agreement in writing considered in 130 I. C. 810. 33 Bom. 69 was dissented from in 58 Bom. 369 and 56 Mad. 85.

It was held by Beaman, J. in *Rukhan Bai* v. *Adamji Shaik Rajbhai* : 33 Bom., 69, that under an oral agreement there could be no valid submission, no valid award, and as such an award would be without any legal foundation and could, therefore, have no legal consequences. It is obvious that the decision was wrong as the correct position is that there is no law which requires a submission to be in writing, and a parole submission is a legal submission ; *Ramutar Sah* v. *Langat Singh* : A. I. R. 1931, Pat. 92 ; 13 Pat. L. T. 101 ; 130, I. C. 810. The decision of Beaman, J. was dissented from in *Mathurdas* v. *Madan Lal* : 58 Bom., 369 ; 36 Bom. L. R. 47 ; A. I. R. 1934, Bom. 79 ; and in *Ponnamma* v. *Kotamma* : 56 Mad. 85 ; 63 M. L. J. 610 ; 139 I. C., 355, A. I. R. 1932, Mad. 745.

The correct position is that to an oral submission or arbitration agreement the Indian Arbitration Act does not apply and, consequently, it is not enforceable in the manner prescribed by that Act, though the award is valid and enforceable by a suit.

Arbitration Act has no application to *oral* submission of agreement.

Under English Law a parole submission would be valid, but that does not come within the English Arbitration Act of 1889 or that of 1934. For a decision under the Act of 1889, see *Fleming* v. *Doig*, (1921) 38. R. P. C. 57.

In earlier English law parole submission was valid but no longer so in Acts of 1889 and 1934.

The law applicable in England before 1889 was the Common Law Procedure Act, 1854 (17 & 18 Vict. C. 125), sec. 11 of which empowered the Court to stay suits "whenever the parties to any deed or instrument in writing....shall agree that any then existing or future differences between them or any of them shall be referred to arbitration....."

Law applicable in England before arbitration legislation of 1889 governed by Common Law Procedure Act 1854.

Where by a covenant in a lease parties agreed to refer disputes which may arise to arbitrators, and on disputes arising appointed arbitrators, Pollock, C. B., said—"there is an obvious distinction between an agreement to refer to an arbitrator to be appointed any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more persons to be appointed, and in pursuance of that disputes are referred, the submission is by parole, although the agreement is by deed, and a parole submission cannot be made a rule of Court :" *Ex parte Glaysher*, (1864) 3 H. & C. 442.

When general agreement to refer future disputes to arbitration and in pursuance thereof disputes are so referred, submission is by parole, although agreement is by deed and such parole submission cannot be made a rule of Court.

No definition of 'submission' before English Act of 1889.

Before the English Act of 1889 there was no definition of 'submission', but it was understood to mean an agreement to refer existing disputes to a named arbitrator, and "an agreement to refer" meant an agreement for referring future disputes to arbitration.

Original submission first in writing but later parties agree to add or alter to it *orally*, award on such added or altered submission award on *oral* submission.

It may happen that the original submission is in writing, but later before the arbitrator or otherwise parties agree to add to or alter orally such a written submission. In such a case an award made on the submission orally altered or added becomes an award on oral submission ; *Thames Iron Works & Company* v. *The Queen* : (1869) 10 B. & S. 33.

Written Agreement

Although definition requires 'written agreement', whether it is to be signed or not by parties has given rise to conflicting decisions not yet finally settled.

While the definition requires written agreement, it does not require that it should be signed by the party or parties. Possibly it is not easy to completely reconcile all the English authorities on the subject. *In Baker* v. *Yorkshire Fire & Life Assurance Company* : (1892) 1 Q.B. 144, and in *Anglo-Newfoundland Development Company* v. *King* : (1920) 2 K.B. 214, signature was held to be unnecessary, whereas the opposite conclusion was arrived at in *Caerleon Tinplate Company* v. *Hughes* : (1891) 60 L.J. Q.B. 640. That the English decisions are not all reconcileable with one another will appear from the following conclusion in *Russell on Arbitration and Award*, 13th Ed., p. 303, which appears at the end of the discussion of these authorities, namely, —"The weight of authority, therefore, appears to support the view that the submission need not be signed by the party charged, unless the contract itself is one which the law requires to

be so signed. But the point cannot be looked upon as finally settled."

In India the question whether written agreement is to be signed or not by parties has been set at rest in *Umed Singh's* case by Judicial Committee.

We are not, however, troubled by the decisions, as in India the matter has been set at rest by the decision of the Judicial Committee in *Umed Singh* v. *Seth Sobhag Mal* : 53 Cal. 290. The fact that it was a case governed by the Civil Procedure Code does not touch the ratio of the decision inasmuch as their lordships were considering a statute which used the same language, that is "in writing." It is, therefore, hardly necessary to refer to the conflicting Indian decisions, particularly as many of them were considered by Rankin, C. J. and C. C. Ghose, J., who held that signature was not required and expressly overruled the decision to the contrary of Page, J. *in John Batt & Co. (London) Ltd.* v. *Kanoo Lal & Co.* in (1925) 53 Cal. 65, Rankin, J. stating that the English Arbitration Act of 1889 and the Indian Arbitration Act of 1899 "for the best of good reasons have not required that the agreement to submit should be signed by both parties. What has been required is a written agreement to submit, and *Baker's case* (1892) I Q. B. 144, *Hickman's case*, (1915) 1 Ch. 881 and the case of *Anglo-Newfoundland Development Co.* v. *King*, (1920) 2 K. B. 214, show that it is illegitimate to import into the statute the requirement of a signature by both parties." *Radha Kanta Das* v. *Baerlien Bros. Ltd.* : 32 C. W. N. 1101, at p. 1104.

Definition not requiring arbitration agreement contained in a formal document or any one document,

Nor does the definition require that the arbitration agreement should be contained in a formal document or any one document. The necessary agreement may be evidenced in an

the necessary agreement may be set forth in any way.

infinite number of ways, of which the following are some examples, namely :—

(1) Clauses in a Contract—*Ganges Manufacturing Company* v. *Indra Chand* : 33 Cal. 69 ;

(2) Bought and Sold Notes—*Ramnarayan Ganga Bissen* v. *Liladhur* : 33 Cal. 1237 ;

(3) The Articles of a Private Company—*Hickman* v. *Kent* : (1915) 1 Ch. 881. This was a case where the articles of association, which contained an arbitration clause taken with application for membership, was held to amount to a submission ;

(4) Endorsement signed by Counsel each on his own Brief : *Aitken* v. *Batchelor* : (1863) 62 L. J. Q. B., 193 ; *Brandon* v. *Smith* : (1853) 22 L. J. Q. B. 321 ; *Clements* v. *Devon Insurance Commissioners* : (1918) 1 K. B., 94 ;

(5) Correspondence between the Parties : *Sukha Mall* v. *Baboolal* : 42 All., 525 ; *Sanker Lall* v. *Jainey Bros.* : 53 All. 384 ; *Lobitos Oilfield* v. *Admiralty Commissioners* (1917) 16 L. J. K. B. 1444 ; *Morgan* v. *William Harrison Ltd.* (1907) 2 Ch. 127 ;

(6) Indent Form with reference to which the Sale Notes were issued : *Radha Kanta Das* v. *Baerlein Bros. Ltd.* (See above).

Application for reference required to be duly stamped as agreement.

An application of reference in order to be valid must be duly stamped as an agreement. But it need not be signed by both the parties : *Ramlal* v. *Hari Bux*, 61 Cal. 702.

Arbitration clause in contract ceases to be operative when work to be done

In connection with arbitration clause in contracts, the effect of repudiation or determination of the contract by some event outside itself will be discussed later ; but an intermediate case may

arise, that the work to be done has so much changed that the action is not on the contract, but on *quantum meruit*. In such a case the arbitration clause ceases to be operative : *Taylor* v. *Western Valleys Sewerage Board*, (1911) 75 J. P. 409.

has so much changed that action is not on contract but on *quantum meruit*.

In connection with arbitration agreements, at one time English Courts used to scrutinise them with suspicion for finding out if the parties have ousted the jurisdiction of Courts. The leading case of *Scott* v. *Avery*, (1856) 3 H.L.C. 811, decides, once for all, that while agreement of parties cannot oust the jurisdiction of Courts, they can validly agree that no action shall be brought until an award has been made, and further that there is no bar in law to prevent parties from agreeing ; that unless a claim is put forward within a specified limited time, such a claim will be deemed to be effectively waived and become unenforceable in a Court of law. These topics, along with the power given to Court by the latest statutes in England and India for enlargement of the limited time in certain circumstances, will be discussed later at appropriate places.

English Courts would at one time subject arbitration agreements to strong scrutiny to find out whether parties had ousted Court's jurisdiction.

The question whether parties can validly agree that neither party should move the Court for compelling the arbitrator to state a case for opinion of the Court on any question of law which was necessary to be answered for deciding the dispute between them was considered in *Czarnikow* v. *Roth, Schmidt & Co.* : (1922) 2 K. B. 478. Following the earlier case *in re Reinhold and Hansloh*, (1896) 12 T. L. R. 422, the Court ordered the arbitrator to state a case.

Whether parties could agree that neither party should move Court for compelling arbitrator to state case for Court's opinion on any law point, decision was that Court could so compel arbitrator.

All that is necessary is that there should be agreement between parties and that such agreement should be in writing, but it is immaterial if the agreement is not to be found in the original written contract in respect of which parties are at variance.

It being clear that all that is necessary is that there must be an agreement between the parties and that the same should be found recorded in writing, it is immaterial if the agreement is not found in the original written contract in connection with which the parties are at variance. This appears from many reported decisions where a document containing the agreement for arbitration is found incorporated in another document. In every case this must necessarily be a question of fact, but, as an example, reference may be made to *Hamilton & Co.* v. *Mackie & Sons* : (1889) 5 T. L. R. 677. Here a Bill of Lading provided that "all other terms and conditions" were to be as in the charter party and the charter party contained the arbitration clause. (For a somewhat similar case, see "*The Portsmouth*" (1912) A. C. 1.). These cases, being based on construction of documents and thus necessarily dependent on the language used in them, one case may not have much bearing on another, but other instances of effective incorporation or otherwise will be found in cases, like *Wade-Gery* v. *Morrison*, (1878) 37, L. T. 271 (Lease and Supplementary Lease) : *Temperley Steam Shipping Company* v. *Smyth & Co.*, (1905) 2 K. B., 791 (Bill of Lading and Charter Party).

When there is writing by one of the parties, as in an insurance policy, the assured by bringing action on the policy is held to have affirmed it.

It may well be that there is no writing by one of the parties. Where in an insurance policy containing arbitration clause there was no signatures or writing of the assured, and he brought his action on the policy, it was said :—"The plaintiff sues on the policy, and by so suing affirms it to be his contract" : *Baker* v. *Yorkshire Assurance Co.*, (1892) 1 Q. B. 144 ; see also *United Kingdom Mutual Steamship Assurance*

Association v. *Houston and Co.*, (1896) 1 Q. B. 567. As a fine example reference may be made to another case where the circumstances were rather unusual, namely, *Nainsukhdas* v. *Gajanand Shyamlal*, 43 All. 348, where the claimants submitted to the Association a claim against the respondent which they had signed. The arbitrators appointed by the Association presented this claim before the respondent who wrote out his answer to the claim and signed it. The Court held that the document contained a submission in writing.

Similarly respondent in accepting signed claim from an arbitrator of another party was held to have made submission in writing.

The warning that the construction of one document by the Court has often but little value on the construction of others should be borne in mind. Indeed it was said in *Robinson* v. *Evans*, (1873) 43 L.J. Ch. 82, that on points of construction precedents may not be cited as authorities unless they explain the meaningof technical terms or lay down general principles, and Lord Macnaghten said in *Ogdens Ltd.* v. *Nelson*, (1905) A. C. 109 : "I entirely agree with the Lord Chancellor, that cases on the construction of other contracts do not help us at all in this matter."

On points of construction precedents may not be cited as authorities unless they explain meaning of technical terms or lay down general principles.

Who may refer to Arbitration

The general proposition is that "Every person, who has a right which he can dispose of, is competent to submit questions affecting that right to arbitration ; and any disabilities that affect the right of disposal will affect his right of submission." Comyn's Digest, Arb. D. 2. In other words, the capacity to refer is governed by rules of laws to contractual capacity : sec. 11 of the Indian Contract Act.

Every person who has a right to dispose of is competent to submit questions affecting that right to arbitration.

Arbitration Agreement by or on behalf of Insolvents

Sec. 7 of the Arbitration Act of 1940 contains provision of a case of insolvency, and the matter will be discussed in connection with that section.

Arbitration Agreement by or on behalf of Minors by Guardians

Although minor cannot refer to arbitration, his guardian can for his benefit, provided such reference is not tainted by fraud or collusion.

In the case of a minor he cannot refer but he is bound by his guardian's reference in the absence of fraud or collusion : *Hardayal Sahai* v. *Gouri Sanker*, 28 All. 25. It will appear later to what class of guardians this statement ought to be applicable. The Court has the right to consider whether the award is for the benefit of the minor : *Sreekrishna* v. *Belumal*, 34 I. C. 845. It has been held also by the Lahore High Court that if the guardian acted in the interest of the minor, the award will be binding on the latter : *Mohan Singh* v. *Mussamat Gur Devi*, 12 Lah. 767. Where a suit is pending, by reason of O : 32, r. 7 of the Civil Procedure Code, the next friend or guardian of a minor shall not, without leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Where such leave has not been granted, the award will not be binding on the minor and he will be entitled to have it set aside by Court : *Jamnabai* v. *Vasanti Rao*, 18 Bom. L. R. 432 P. C. ; *Atmaram* v. *Bhila*, 15 Bom. L. R. 223 ; *Vijaya Ramayya* v. *Venkatasubba Rao*, 39 Mad. 853.

The guardian *ad litem*, who has become party to a reference and award on behalf of the minor, without taking leave of Court cannot himself apply for having the award set aside: *Golenur Bibi* v. *Abdus Samad*, 58 Cal. 628. The arbitration agreement is voidable at the instance of the minor under order 32, rule 7, sub-rule 2, C. P. C.

Guardian *ad litem* as party to reference and award cannot apply for setting aside award without Court's leave.

It has been said that a minor is bound by his guardian's reference in the absence of fraud or collusion, and if the guardian acts in the interests of the minor, but I would like to sound a note of warning about the proposition being accepted as of general applicability to all kinds of guardians. The right of a natural guardian to refer to arbitration has been considered and the authorities reviewed in one of the encyclopædic judgments of Mookerjee, J. in *Ramji Ram* v. *Salig Ram* : 14 C. L. J. 188. His Lordship, after referring to twenty-seven English and Indian authorities, has come to the conclusion that : "It is indisputable that a guardian may submit to arbitration on behalf of his ward so as to bind both himself and the ward ; though, no doubt where the guardian is, in his individual capacity, a party to the submission, and his interest in the controversy submitted happens to be adverse to that of his ward, he has no power to submit on behalf of his ward." In this case before his Lordship the guardian was so both *de facto* and *de jure*. But many of the authorities cited and directly or indirectly approved in the judgment refer to cases of natural guardians, who are not in the position of the guardian in *Ramji Ram* v. *Salig Ram*.

Proposition that minor is bound by his guardian's reference in absence of fraud or collusion or if guardian acted in interests of minor is not of general applicability.

Among the cases thus approved is the case of

Among cases approved on the point is *Romon Kissen Sett* in 19 Cal. 334 by Trevelyan, J.

Romon Kissen Sett v. *Hurro Loll Sett* : 19 Cal. 334. The reference to arbitration was in that case signed on behalf of the minors by their mother and natural guardian, and Trevelyan, J. said : "The cases appear to show that a minor can set aside an award on coming of age, and that a natural guardian has power to submit to arbitration. I think the best course to pursue is to make a reference to the Registrar to enquire and report whether the submission to arbitration, and the award is, or is not for the benefit of the infants." The case was governed by the Civil Procedure Code and arose from an application made to the Court for filing the award.

Decision contrary to Trevelyan J's is *Shanti Lal Mewaram* in 56 Bom. 595.

The direct contrary to the decision of Trevelyan, J. has been laid down in *Shanti Lal Mewaram* v. *Munshi Lal Kewalram* : 56 Bom., 595, in which their Lordships held that under Hindu Law a mother could not bind her minor son by reference to arbitration. The reference there was also not under the Indian Arbitration Act nor in any pending suit. The Bombay case is a well-considered decision which has taken into consideration important aspects of the question, which found no place in the judgment of Trevelyan, J.

The two decisions aforesaid being contradictory *Mohammad Ejaz Husain's* case in 59 I. C. 92 requires careful consideration, 39 I. A. 49 being a settlor on the point

It will be unnecessary to refer to numerous authorities which will be found in the Reports on the question of a minor being bound by a reference to arbitration made on his behalf by his guardian but as the two decisions cited are in direct contradiction, it is worthwhile enquiring which of them is correct. For this purpose *Mohammad Ejaz Husain* v. *Mohammad Iftikhar Husain*, 59 I. A. 92, requires careful considertion. It is quite true that the case related to a

having held that the guardian is to be *both* a *de facto* and a *de jure* guardian.

Mohamedan family, but their Lordships enquired into the provisions and principles of Mohamedan Law to find out whether the mother, beyond being entitled only to the custody of the person of her minor child up to a certain age, had any right to deal with her minor child's property. Having come to the conclusion that she had none, their Lordships proceed to state that "the term '*de facto* guardian' that has been applied to these cases is misleading ; it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous, and the judgment of the Board in *Mata Din* v. *Ahmad Ali* (39 I. A., 49) clearly indicated it." The argument which found favour with their Lordships was that if the mother had no power to deal with the property of her child, she would have no authority to enter on his behalf into an agreement to refer the disputes to arbitration, which, if acted upon, would necessarily affect the immovable property of the infant plaintiff. In the face of this pronouncement by the Judicial Committee, it is impossible to support references to arbitration by a natural guardian or a *de facto* guardian as being binding on the minor, unless the guardian is a *de jure* guardian having authority to intermeddle with the property of the minor. There are some authorities in which a reference to arbitration by the mother of a Hindu minor as natural guardian has been held to be binding on the latter, because she acted *bona fide* in the interests of the minor. See, for instance, the decision of the Patna High Court in *Ramutar Sah* v. *Langat Singh*, A. I. R. (1931) Patna 92. The

minor was held bound by reference to arbitration made by the *Am-Mukhtear* of the mother who was the natural guardian. Whether the *Am-Mukhtear* had authority on behalf of the mother, it is submitted, should make no difference, but the report does not show that he had such power. Their Lordships referred to the decision of Trevelyan, J. already referred to and used that as an authority for the proposition that the mother as the natural guardian could bind her minor son by reference to arbitration. This decision and others to the same effect must be taken to be incorrect. In Bombay, before the decision in *Shanti Lal Mewaram* v. *Munshi Lal Kewalram*, 56 Bom. 595, there were decisions supporting the proposition that a natural guardian, like the mother, could validly refer matters to arbitration on behalf of the minor, *e.g. Sadashiv* v. *Trembak*, 44 Bom. 202; *Vithaldas* v. *Dattaram*, 26 Bom. 298.

When guardian's interest opposed to minor's, award resulting from reference to arbitration by former will not be void but *voidable*.

Another caution which it is necessary to give is that in *Ramji Ram* v. *Saligram*, 14 C. L. J. 188, in connection with the guardian's interest being adverse to that of the minor, the words used "he has no power to submit on behalf of his ward" may, unless properly understood, turn out to be misleading. If the interest of the guardian is in conflict with that of the minor, the award resulting from a reference to arbitration by him will not be void but only voidable, and the award cannot be attacked by any party to the submission, except by the minor.

Submission by Certificated Guardians

Powers of certificated guardian

If the guardian is one appointed under the provisions of the Guardians and Wards Act VIII

of 1890, his powers are controlled by the Act. He has the power to deal with the minor's property, but is bound to deal with it as carefully as a man of ordinary prudence would deal with it as if it were his own, and subject to the provisions of Chapter III "he may do all acts which are reasonable and proper for the realisation, protection or benefit of his property".

governed by Guardians and Wards Act 1890. He is to act as man of ordinary prudence and deal with minor's property as his own.

The Guardians and Wards Act of 1890 places no express limitation to the power of the guardian to refer to arbitration disputes relating to the property of his ward, and this position, though confirmed in *Said-en-nessa Bibee* v. *Ruquaiya Bibee*, 53 All. 428, it was said there, that although the guardian had authority to agree to arbitration as the guardian of the minor, it would have been more prudent for him to have first obtained the Court's direction under sec. 33 of the Act, and in failing to do so, the guardian acted irregularly. This decision does not make it incumbent on the guardian to take Court's direction before agreeing to arbitration on behalf of his ward, and in the absence of fraud or gross negligence, the minor will be bound, though such direction had not been obtained : *Hardeo Sahai* v. *Gauri Shankar*, 28 All. 35 ; *Lutawan* v. *Lachaya*, 36 All. 69 (F. B.).

No express limitation on certificated guardian's power to refer to arbitration disputes relating to minor's property, but it would be prudent for him to take Court's direction beforehand.

The Indian Arbitration Act, 1940, in its second schedule, which relates to Powers of Court, provides by para. 5 the power of : "The appointment of a guardian for a minor or person of unsound mind for the purpose of arbitration proceedings", a provision absent in earlier Indian statutes and the English Arbitration Act of 1934.

Arbitration Act 1940 empowers Court for first time to appoint guardian for minor or person of unsound mind for arbitration proceedings.

Arbitration Agreement by Executors and Trustees

Arbitration agreement by executors or trustees is to depend on nature of controversy to be submitted to arbitration but question whether a will is genuine or not can never be referred to arbitration.

Whether an executor or trustee has power to refer matters, relating to the will or matters connected with the testator's estate, to arbitration, depends on the nature of the controversy submitted to the arbitrators. For instance, an executor cannot refer to arbitration the issue of genuineness or otherwise of a will. In *Norman* v. *Strains* : (1880) L. R. 6, P. D. 219, the Court, in spite of an agreement between the parties to probate proceedings, held that it was the duty of the Court to determine whether or not a particular will was the will of a deceased person. In *Ghella Bhai* v. *Nandu Bai* : 21 Bom. 535, Candy, J. held that "the executor could refer to arbitration the question of genuineness of the will", but this conclusion was reversed in appeal, and Farran, C. J. laid down that "the executor's action is not authorised either by the mandate which he has received from a testator or by the trust under which he is to the beneficiaries. Similarly in *Monmohini Bangachandra* : 31 Cal. 357, it was held that the grant of probate passed on an award was invalid. The reason for these decisions will also be found discussed in *Mussammat Janak Bati Thakurain* v. *Babu Gajanand Thakur* : 20 C. W. N. 986, where their Lordships explained that although parties to probate proceedings could enter into a compromise and the objector could withdraw from the contest, that would only involve grant of the probate in common form. The parties can make the proceedings non-contentious, and nobody but the Court has the power to decide whether a will is genuine or not.

Having seen that the question of genuineness of a Will cannot be referred to arbitration, the question arises whether the matter of construction of a Will can be so referred. In *Steff* v. *Andrews* : (1816), 2 Madd. 6, the matter of construction of a will was referred to arbitration, and an award having been made, an application was made to set it aside, but the Court refused to do so holding that : "If a point of law be referred to the decision of an arbitrator, the parties are bound by his decision, whether right or wrong, unless fraud or corruption is imputable". But it has been stated in some Indian text books that the Calcutta High Court has taken a different view. It may be said that in *Jnanendra* v. *Jitendra* : 32 C. W. N. 109, the Calcutta High Court has taken a different view, inasmuch as it has held that the law does not permit executors, if any, of having the Will construed by a tribunal of their own choice, without proving the Will and evading the duty fixed by law and to allow executors of some of the legatees to join together and make an arrangement for distribution of the properties contrary to the testator's intention and to the prejudice and detriment of the remaining legatee or legatees under the Will. It is submitted that had the Will been probated and all the necessary parties joined to have it construed by arbitrators, that would have been perfectly legal. It may also be pointed out that *Steff* v. *Andrews* was not referred to either during arguments or in the judgment of the case in the Calcutta High Court. Again in *Saudamini* v. *Gopal* : 19 C. W. N. 948, no doubt the Court held that the executors could not make the submission, but the basis of the decision was

Matter of construction of will can form subject-matter of arbitration inasmuch as pure questions of law may be referred to arbitration.

that the executors had arranged for arbitration with the avowed object of modifying the terms of the Will. Indeed at p. 952 it has been stated, after referring to *Steff* v. *Andrews* and other authorities, that "it need not be disputed that pure questions of law may be referred to the decision of an arbitrator [*Steff* v. *Andrews*, (1816) 2 Madd. 6 ; *Ching* v. *Ching*, (1801) 6 Ves. 281 ; *Young* v. *Walter*, (1804) 9 Ves. 364 ; *Mathew* v. *Davis*, (1842) 1 Dowl. N. S. 679 and *Gulam Jilani* v. *Mohammed Ahmed Husan*, 29, I. A. 51]. But the arbitrators are here authorised to do something more than a construction of the Will, which, as their Lordships of the Judicial Committee said in *Venkata* v. *Parthasarathy*, 18 C. W. N. 554, does not mean an addition to the terms of the Will : they are not empowered to alter the terms of the Will. This plainly was not within the competence of the executors".

Reference to arbitration for division of testator's estate held valid.

A reference to arbitration for the division of the testator's estate subject to his directions has been held to be valid in *Shankar* v. *Ramchandra* : 25 Bom. L. R. 437.

Other matters apart from genuineness of will and its construction which generally devolve upon executors or trustees will form subject of valid submission.

Apart from the question of genuineness of a Will and its construction, executors and trustees are concerned with various matters connected with administration of the estate which devolves on them. As regards such matters there is no reason why a valid submission cannot be made by an executor or administrator. Whether the legal representative of a deceased party is, or is not bound, or entitled to enforce arbitration agreement, has been the subject of many decisions, like *Ramji Ram* v. *Salig Ram* : 14 C. L. J. 188 ; *Manindra* v. *Mahananda* : 15 C. L. J. 360 ; but the matter is now concluded by sec. 7

and indeed some of the authorities are not consistent with this section.

Under Trust Act 1882 trustees entitled to submit to arbitration any debt, account, claim or any thing regarding trust.

In India where the executor is a trustee, under the Indian Trust Act II of 1882, two or more trustees acting together may, as they think fit, compromise, compound, abandon, or submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust. This provision implies that the trustees should act together.

Arbitration Agreement by Manager of Joint Hindu Family

When suit is pending, father or manager of joint Hindu family cannot bind minor by reference to arbitration if he has not already taken leave of Court.

In the case of the father or manager of joint Hindu family, his powers to bind coparceners differ depending on whether a suit has been filed or not. In *Ganesha* v. *Tula Ram*, 36 Mad. 295, the Judicial Committee decided that where a partition suit had been filed, the power of the father was controlled by sec. 462 of the Civil Procedure Code of 1882 (O, 32, r. 7, C. P. Code, 1908), but the leave of the Court was necessary. In that case there was a compromise providing for reference to arbitration and their Lordships said that it was quite clear that "when the father or managing member is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court." It follows then that where a suit is pending the father or manager of the Hindu joint-family cannot bind minors by reference to arbitration if he has not obtained leave of the Court for that purpose.

But case would be otherwise when no suit was pending.

Where no suit is pending, the father, or manager, or in his capacity as the managing member of the family, can refer to arbitration such matters as can be validly submitted to arbitration: *Rameswar* v. *Ram Bahadur*: 34 Cal. 70 P.C.; *Rambilas* v. *Birich Singh*: 11 Pat. 131; *Balaji* v. *Nana*, 27 Bom. 287 and *Chinna Poochiammal* v. *Ganga*: 9 M. L. J. 34. In the Bombay case the reference to arbitration was not in a pending suit, but inasmuch as the arbitration was one to which the Civil Procedure Code, and not the Indian Arbitration Act, applied, a decree was passed by the Court on the award. To this decree the sanction of the Court under sec. 462 of the Civil Procedure Code of 1882 was not obtained, and it was contented that at the time of the passing of the decree the Court ought to have considered whether the award was for the benefit of the minor. The Court negatived this contention holding that: "If the reference to arbitration was proper in the sense that it was for the benefit of the minors, the Court was bound to pass a decree in terms of the award passed on that reference, if there was none of the objections to the award pointed out in the chapter on arbitration in the Civil Procedure Code. There was no duty imposed on the Court at that stage of considering whether the terms of the award were for the benefit of the minors." (at p. 291). In coming to the conclusion the Court replied on a passage in *Ghulam Jilani* v. *Muhammad Hassan*, 29 I. A. 51, namely :—"The time has long gone by since the Courts of this country shewed any disposition to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law :

See *Adams* v. *Great North of Scotland Railway Company*, (1890) A. C. 31". But an instance of the decree being held to be binding on a minor in spite of arbitrators taking an erroneous view of law is found in *Sakrappa* v. *Shivappa* : 35 Bom. 153.

Where decree was passed, but the minor was not properly represented, there being no formal order appointing the mother as guardian *ad litem*, though she consented to reference to arbitration and to decree being passed on the award, it was contended that the decree based on the award was not binding on the minor. With reference to this contention it was said that the case of *Partap Singh* v. *Bhabati Singh* : 40 I. A. 182, supported the contention and that it was pointed out in *Mussamat Bibi Walian* v. *Banke Bihari Persad Singh* : 30 I. A. 182, that it was obligatory on Courts to comply with sec. 443 of the Civil Procedure Code, 1882, and that the irregularity in that case was condoned on the ground that on the particular facts the minor was held to have been effectively represented : *Sadashiv Ramchandra* v. *Trimbak Keshav* : 44 Bom. 202.

Mother consenting to arbitration without being appointed guardian *ad litem*, decree passed on such award held not binding on minor.

Although in connection with joint Hindu family only the father has so far been mentioned, the senior members can also bind junior members by arbitration proceedings carried on by them in good faith as was decided in *Chinna Poochiammal* v. *Ganga* : 9 M. L. J. 34.

Besides father senior members of joint family can also bind junior members by arbitration proceedings.

Arbitration Agreement by Hindu Widow to bind Reversioner

The powers of a Hindu widow to bind the reversioners by an award would depend upon

Power of Hindu widow to bind

reversioner by award depends upon considerations similar to valid compromise by widow.

considerations similar to a valid compromise by the widow. If the compromise is made *bona fide* for the benefit of the estate and not for her personal advantage, it will bind the reversioner as much as a decree on contest : *Rama* v. *Narayanaswami*, 51 M. L. J. 313 ; *Kanhaiyalal* v. *Kishen* : 38 Mad. 679.

Arbitration Agreement by Agent

Agent's authority to bind his principal by arbitration depends in each case upon facts.

This is only one aspect of the general law as regards acts of agents which binds the principal. While an arbitration agreement can be signed by a duly authorised agent, there is no law requiring that the agent's authority should be a written one. The nature of the agent's authority must depend in each case upon its own facts, but if the agent is duly authorised in conducting a reference on behalf of a party, he may bind his principal by his conduct before the arbitrators, for example, by waiving irregularities of procedure. In *Backhouse* v. *Taylor* : (1851) 20 L. J. Q. B. 233, an irregular appointment of an umpire by drawing lots was held to have been waived by the conduct of the agent. Similarly in *Hamilton* v. *Bankin* : (1850) 3 DeG. & S. 782, the agent had agreed that one of the parties should produce evidence before the umpire in the absence of the other. That irregularity was held to have been waived by reason of the agent having agreed to that procedure. It may well be that a submission is not originally binding on the principal by reason of the agent's want of authority, but if the conduct of the agent is ratified by the principal, the latter may be bound. It may be seen from *Baker* v. *Yorkshire Fire and Life Assurance Company* : (1892) 1 Q. B. 144, that party,

not originally bound, may affirm the arbitration clause by his acts. There it was not a matter of unauthorised agency, but an analogous principle will apply to an unauthorised arbitration agreement entered into by an agent purporting to act on behalf of his principal. A principal who wants to take advantage of the agent's want of authority may be precluded from doing so by reason of his own conduct. Such an instance will be found in *Saturjit* v. *Dulhin* : 24 Cal. 469, where the power-of-attorney did not authorize the agent to submit to arbitration, but the principal, after being aware of those proceedings and of the action of the agent, stood by and allowed the reference to continue, but later challenged the award when it was made against him. The Court refused to set aside the award : (Cf. also *Unniraman* v. *Chathan* : 9 Mad., 451). An arbitration agreement may happen to be signed by a person as agent for a principal *e.g.* a contract for the sale of goods containing an arbitration clause signed by seller's brokers "by the authority of our principals as agents". If, in such circumstances, brokers take up the attitude that as agents they are not parties to the arbitration agreement, no arbitrator are to be appointed, as that will amount to a finding that the agents are parties to the arbitration, when they are disputing whether they are liable under the contract : *Miller Gibb & Co.* v. *Smith* : (1916) 1 K. B. 419.

Arbitration Agreement by Counsel, Solicitor and Pleader

There can be no doubt that a Barrister has very large powers to adjust a suit : *Sourendra*

Barrister can of his own authority bind his client by agreeing in Court to refer disputes in suit to arbitration.

Nath Mitra v. *Turubala Dasi*: (1930) 57 I. A. 133; which reversed the judgment of the Divisional Bench of the Calcutta High Court that held that the settlement was not binding inasmuch as the client had given no express authority, and further that a Court would not follow "a rule of practice in England which has its roots in different traditions and environments." However large the powers of the lawyer engaged in the case may be, such powers are confined to the conduct of the proceedings in the tribunal before whom he has been authorised to appear. He has no power to refer to arbitration, which means sending the matter to another tribunal for disposal. The law is that Counsel has general authority to compromise a suit on behalf of his clients in Court, but a compromise effected by Counsel out of Court and not assented to by his client is only binding upon the client, if it is expressly authorised or subsequently ratified by the client or his agent authorised in that behalf. Incidentally reference may be made to the judgment of Page, J. in *Askaran Choutmal* v. *E. I. R. Co.*, 52 Cal. 386, in which his Lordship pointed out that there was no distinction between the authority of Barristers and that of other Advocates practising on the Original Side of the High Court. But the decision does not militate against the proposition that Counsel cannot of his own authority bind his client by agreeing in Court to refer the disputes in suit to arbitration. On the other hand a Solicitor engaged in a case has no implied authority to refer the submission of the dispute to arbitration: *Wright* v. *Castle*: (1817) 3 Meriv. 12, and *Atkinson* v.

Solicitor or Pleader has no right to agree to arbitration on behalf of client.

Abbott: (1855) 3 Drew., 251. In Mofussil Courts sometimes *vakalatnamas* contain an express authority for reference to arbitration, but, in the absence of such authority, a Pleader has also no right to agree to arbitration on behalf of his client. *Kali* v. *Rajani* in 25 Cal. 141 is a decision on the point. No lawyer has in fact the right to compel his client to take the proceedings in which he is engaged from the Court for decision by a domestic tribunal.

No lawyer has right to compel client to take proceedings out of Court for decision by domestic tribunal.

Arbitration Agreement by Partner

It is not necessary to consider whether all the earlier authorities in connection with this matter can be completely reconciled with one another, as the situation is now governed by sec. 19, cl. 2(*a*) of the Indian Partnership Act, 1932, which expressly lays down that, in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to "submit a dispute relating to the business of the firm to arbitration." A partner, in order to enable him to make a valid reference to arbitration of a dispute relating to the business of the firm, must have express authority, but provided such authority can be proved, writing does not seem to be essential. While in the absence of express authority, partners, other than the one who made the submission, are not bound, yet they may become so by their conduct as held in *Thomas* v. *Atherton*: (1878) 10 Ch. Div. 185, where the other partners not only raised no objections to arbitration but attended before the arbitrator. The same principle is applicable in India as was clearly stated by the

In absence of express provision, implied authority of partner does not empower him to submit dispute relating to business or firm to arbitration.

Judicial Committee in a case where neither a deceased partner nor his legal representatives were party to the submission. What Lord Parker stated therein is as follows: "The question whether the legal personal representatives were bound by the agreement and award was not a simple question of law ..... Even if the agreement to refer was not originally binding on such legal personal representatives, it may have become binding on them by their acquiescence therein, or their acceptance of benefits thereunder": *Dwarka Nath* v. *Haji Mahomed*: 21 C. L. J. 1 at p. 3. Even before the passing of the Indian Partnership Act of 1932, one partner, in the absence of express authority, could not bind other partners by reference to arbitration: *Ram Bharosa* v. *Kalloomall*: 22 All. 135, which laid down the same principle as the majority of English authorities on the point.

Partner that does not so expressly authorise is not bound by act of his co-partner in arbitration matter.

In the case of a partner making reference to arbitration, when he is not authorised to do so, the award, as has been seen, is not binding on his co-partners. What, however, is the position of the partner who has agreed to the arbitration? The law thereon, as stated in *Russell on Arbitration and Award*, 13th Ed., at p. 24, is as follows:

"The fact that a partner purporting to submit on behalf of himself and the other partners does not bind them does not make the submission the less binding upon him, and if he undertakes that the award shall be performed it is none the less a breach of his undertaking if his partners will not perform their share because they are not bound."

So far the discussion has been confined to arbitration between a firm and a stranger relating to business of the firm, but disputes frequently arise between partners *inter se*, and then the matter of arbitration is generally regulated by the arbitration clause, if any, in the partnership-agreement. The scope and extent of the arbitration clause must necessarily depend on its language, but it may be pointed out that the real intention of the parties to avoid litigation in Court is sometimes defeated by not making the clause sufficiently wide. By way of illustration reference may be made to the case of *Piercy* v. *Young* : (1879) 14 Ch. Div. 200, where the arbitration clause was to this effect : "Any differences or disputes that may arise between the partners shall be settled by an arbitrator to be agreed upon between the partners." The dispute which actually arose was whether the shares of the other partners had been bought on behalf both of the plaintiff and defendant, or of the defendant alone. Sir George Jessel and his colleagues held that such a dispute was outside the scope of the arbitration clause principally on the ground that the main dispute "was not anything relating to the transactions which were the subject of the different articles of the partnership agreement, but a dispute as to whether there was any existing partnership at all." (*per* Thesiger, L. J., at p. 212).

Disputes arising between partners *inter se* outside business is regulated by arbitration clause, if any, in partnership-agreement and on due interpretation of language.

If partners desire that an arbitrator shall have the power to order dissolution of partnership, give all directions to partners and decide all disputes arising out of the partnership, the arbitration clause should be drawn in a very

When partners desire that arbitrator shall dissolve partnership, give directions to

partners concerning dissolution and decide disputes arising out of partnership, arbitration clause in partnership agreement must be comprehensive.

comprehensive manner, as, for instance, in the partnership agreement which was considered in the case of *Belfield* v. *Bourne* : (1894) 1 Ch. 521. There the arbitration clause provided for reference to arbitration of any difference as to construction of any of the articles, or as to anything to be done in pursuance thereof, or to any other matter or thing relating to the partnership, or the affairs thereof.

When partner has instituted suit in breach of arbitration clause in partnership agreement, other partners insisting on arbitration may get Receiver appointed in suit by staying all further proceedings.

In connection with partners having an arbitration clause in their partnership agreement, a partner may try to avoid arbitration by filing suit in Court. A Receiver is ordinarily appointed in case that is wanted by a partner in connection with a dissolved partnership. Where a suit has been brought in connection with such a partnership in breach of an arbitration clause, the partner, insisting an arbitration, may get an order appointing a Receiver in the suit and staying all further proceedings. This power is to be found in para. 4 of the second schedule of the Arbitration Act of 1940. This power is also expresssly given by the English Arbitration Act, 1934, but the course indicated above was repeatedly followed by English Courts before 1934. Thus where one partner filed suit ignoring the arbitration clause and applied for appointment of a Receiver, a Receiver was appointed, but all further proceedings were stayed on the application of the other partners : *Pini* v. *Roncoroni* : (1892) 1 Ch. 633.

Instances of Court appointing a Receiver and staying all further proceedings in the suit, except for the purpose of giving effect to the order appointing a Receiver, will also be found in *Zalinoff*

v. *Hammond* (1898) 2 Ch. 92 ; *Plews* v. *Baker* (1873) L. R. 16 Eq. 564, and *Law* v. *Garrett* (1878) 8 Ch. D. 26. Where there is a reference to arbitration by partners, any one of them can apply to Court for appointment of an arbitrator or umpire where the conditions required by sec. 8 of the Arbitration Act, 1940, exist. This power is limited to partners who are parties to the reference and cannot be extended to a new partner validly nominated under the partnership agreement by a retiring partner who was a party to the reference : *In re Franklin and Swaythling's Arbitration*, (1929) 1 Ch. 238.

Instances of Court appointing Receiver and staying all further proceedings found in 2 Ch. 92 and 8 Ch. 26. But power of partner to apply to Court for appointment of arbitrator or umpire is limited to those partners who were parties to reference.

Arbitration Agreement by Lunatics

Being incapable of contracting a lunatic cannot agree to arbitration. But the law as stated in *Russell on Arbitration and Award*, 13th Ed., p. 22 is : "It would seem, therefore, that a lunatic may submit to arbitration, and so long as he is not, to the knowledge of the other party, so insane as not to know what he is doing, the submission will bind him, unless he has been found lunatic by an inquisition." But the correctness of such a statement is open to doubt.

Lunatic cannot agree to arbitration being incapable of contracting. Correctness is doubted of Russell's view on the point.

What persons are bound by Submission

In circumstances already stated, minors, beneficiaries, principals, etc. are bound, but the position of the assignee yet remains to be considered. The law on the point is thus enunciated in *Halsbury's Laws of England*, vol I., para. 1074 : "The submission is binding on the parties thereto ; and where the subject-matter of the reference is capable of assignment the assignee of a party to

Assignee of party to reference will be bound by submission although he has not expressly that power nor would he ordinarily have such power.

the submission would be likewise bound." This does not mean that the assignee has necessarily the power to refer matters to arbitration, and, indeed, ordinarily he would not have such a power. The statement in *Halsbury's Laws of England* quoted above is supported by the learned author by relying upon *Smith* v. *Jones* : (1842) 1 Dowl. (N. S.), 526, but it will be found that the facts in that case were that pending a reference to arbitration a party assigned his contingent right under the award to X. After the award the party himself received the awarded amount. It was held that X could bring an action against the party for monies had and received. But the true position is clearly stated in *Cottage Club Estates Ld.* v. *Woodside Estates Company (Amersham) Ld.* : (1928) 2 K. B. 463, where a contractor X had contracted with Y to build some houses for him and the building contract contained an arbitration clause. The contractor X assigned to a bank all monies due or which would be due under the contract. Dispute arose as to the amount payable by Y to the contractor, and upon arbitration Y contended that the contractor could not maintain his claim as he had assigned his rights of any money which would become due to the bank. Wright, J., in delivering his judgment stated thus : "The arbitration clause is a personal covenant, and cannot be transferred ; nor indeed was it transferred in any sense in this case. The arbitration clause remained in full force and effect as between the original parties." The award for £448 in favour of the contractor was, however, set aside on the ground that having assigned the monies due, he could

get no award for any amount. It is hardly necessary to point out that the arbitration agreement may be so drawn up as to expressly include assignees, in which case the ratio of the decision in. *Cottage Club* case in (1928) 2 K. B. 463 can have no application.

Duration of Arbitration Agreement

Arbitration agreement will expire when award not made within stipulated time or period of extension agreed to by parties or ordered by Court.

An arbitration agreement may expire if the award is not made within a stipulated time or within the period of extension agreed to by parties or ordered by the Court. The subject of extension of time by the Court will be considered later. Apart, however, from the end of the arbitration agreement by reason of effluxion of the time mentioned in it, there are other ways by which an arbitration clause may be determined and become inoperative, namely, by some event outside the contract in which the arbitration agreement is contained, or by repudiation of the entire contract in certain circumstances. Of the many authorities dealing with this matter, reference will be made to a few only which will illustrate the principles applicable to the case. In a fire policy there was an arbitration clause with the condition that if any difference should arise on any claim, it should be immediately submitted to arbitration. The insurers denied the general right of the assured to recover anything and not merely the quantum of damage. It was held that the assured could maintain an action on the policy in spite of the condition for arbitration : *Goldstone* v. *Osborn*, (1826) 2 C. & P. 550. The decision in *Jureidini* v. *National British & Irish Millers Insurance*

Co. Ld. : (1915) A. C. 499, brings out the point involved lucidly. There the insurance company repudiated the claim of the assured on grounds of fraud and arson. Viscount Haldane, L. C. thus stated : "There has been in the proceeding throughout a repudiation on the part of the defendants of liability based upon charges of fraud and arson, the effect of which is that the right to all benefit under the policy is forfeited, but one of the benefits is the right to go to arbitration under this contract...and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract" (at p. 505). In the case under discussion the arbitration clause provided that if any dispute arose as to the amount of any loss, such difference should, independently of all other questions, be referred to arbitration and that it should be a condition precedent to any right of action upon the policy that the award of the arbitrator or umpire of the amount of the loss if disputed should be first obtained. The reasoning of such a line of cases is to be compared with that in *Stebbing* v. *Liverpool and London and Globe Insurance Company* : (1917) 2 K. B. 433. There the policy provided that if any false declaration was made or used in support of a claim, all benefit under the policy should be forfeited and all differences were to be referred to arbitration. The Insurance Company resisted the claim on the ground that the assured had made false statement in the proposal form. It was held that 'the Company was not seeking to avoid the policy but was relying on

one of the terms of the contract contained in the policy and therefore the arbitration clause continued to be operative.' The same principle was applied in *Bejoy Lal* v. *India Assurance Co.*, 41 C. W. N. 339, where on there being a total loss by fire the assured claimed Rs 20000/-. The claim was rejected by the Insurance Company on the ground of its being a fraudulent one, a contingency that was covered by one of the clauses in the policy. As the rejection was based on a clause in the contract, it was held not to amount to repudiation of the contract of insurance *in toto*, the Court relying upon *Stebbing's case*, (1917) 2 K. B. 433 ; *Freshwater* v. *Western Australian Assurance Co. Ld.*, (1933) 1 K.B. 516 ; and *Macaura* v. *Northern Assurance Co. Ld.* (1925) A.C. 619. Where a party repudiates a contract, but such repudiation is not accepted by the other party and the repudiation is withdrawn, the former can rely on the repudiation : *Stevens and Sons* v. *Timber etc. Insurance Association* (1933) 102 L. J. K. B. 337. Again a very instructive case is that of *Messrs. Hirji Mulji* v. *Cheong Yue Steamship Company* : (1926) A.C. 497. Messrs. Hirji Mulji chartered a ship, and the charterparty contained a clause by which all disputes arising out of the contract were to be submitted to arbitration. The ship was requisitioned by the Government and there was complete frustration of the contract. In deciding Lord Sumner said : "The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too. This must be so, if the law is, that the

legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen" (at p. 505). From *De La Garde* v. *Worsnop & Co.* : (1928) Ch. 17, it appears that the test is where the contract is determined by something outside itself, in which case the arbitration clause is determined with it or by something arising out of the contract, in which case the arbitration clause remains effective and can be enforced. Clauson, J., after referring to the case of *Hirji Mulji* : (1926) A.C. 497, proceeded to state thus : "It is true that if, for some reason of that kind, that is to say, by reason of something occurring dehors the contract, the contract is brought to an end, when it is brought to an end the clause providing for submission to arbitration will die with it." Another type of cases is where the arbitration clause contained in a contract is terminated by reason of the contract in the course of performance or settlement of dispute involving intercourse with enemy after the declaration of war.

Arbitration agreement may be determined by some event outside contract in which arbitration agreement is contained or by repudiation of entire contract in certain circumstances.

It is, however, to be remembered that if no such intercourse is involved, then the arbitration clause will remain effective, though the carrying out of the contract may have become impossible by reason of the outbreak of war. For instance, where the contract was for supply of goods to German merchants, and it contained a suspensory clause on the happening of certain events, war not being specifically mentioned. On the Germans becoming enemy aliens, it was held that as clauses of the contract including arbitration clause all pointed to intercourse with the enemy, though deliveries might be suspended under

terms of the contract, its further performance became illegal: *Zinc Corporation Ltd.* v. *Hirsch*: (1916) 1 K. B. 541. In *Ertel Bieber and Co.* v. *Rio Tinto Co. Ltd.*: (1918) A.C. 260, the suspensory clause included the event of war, and it was held that when *ex hypothesi* all deliveries under the contract were suspended, there was nothing for the time being to arbitrate about.

When parties carry on business between themselves without fresh agreement after expiry of original one, arbitration clause will be deemed part of old terms of business unless intended to contrary.

It has already been said that, where the contract comes to an end by effluxion of time, the arbitration clause as part of it equally expires, but a situation may arise where the parties carry on business between themselves without a fresh agreement after the expiry of the original one. In such a case, depending on its facts, the arbitration clause may be deemed to be part of the old terms of business and will be effective, unless there is a clear declaration of intention to the contrary. Instances of such implied continuation of the period of arbitration agreement may be seen in cases of partnership for a specified period where business is carried on after its expiry. In a case of a partnership of this description, where the partnership deed contained an arbitration clause, the executors of a deceased partner instituted a suit for winding up of the partnership. The other partner contended that the partnership had been carried on even after the time limited in the deed, and that, consequently, the arbitration clause continued to be operative and that the suit should be stayed. This contention was upheld in *Cope* v. *Cope*: (1885) 52 L. T. 607. In an earlier case governed by the Common Law Procedure Act, 1854, the partnership deed fixed its duration to one year

but business was continued after the expiry of one year as the result of verbal agreement. It was held there that the arbitration clause still remained operative as the partnership must be deemed to have continued on the old terms : *Gillet* v. *Thornton*, (1875) L. R. 19 Eq. 599.

LECTURE III

NATURE, SCOPE AND EXTENT OF ARBITRATION CONTINUED

Void Contracts

The discussion so far related to contracts valid at the start coming to an end later. But where it is void *ab initio*, it cannot be made the foundation of any application in a Court : *Lee Joe Ltd.* v. *Lord Dalmeny*, (1927) 1 Ch. 300 and a submission contained in such a contract is invalid.

When contract is void *ab initio*, submission contained in such contract invalid.

Where in a gaming transaction if any part of it is legal, the arbitration agreement may still be operative : *Hawker* v. *Hood*, (1853) 1 W. R. 316.

Where gaming transaction legal, arbitration agreement operative.

Where a contract is impeached as not being binding on a party on some equitable ground, like fraud or mistake or surprise, the arbitration clause does not come to an end, but injunction may be issued by the Court in a suit property framed for restraining arbitration proceedings : *Kitts* v. *Moore*, (1895) 1 Q. B. 253.

Where contract impeached on equitable ground, arbitration clause does not come to end.

Where the plaintiff relied on no equitable ground for impeaching the contract containing the arbitration clause but alleged that the contract was a gambling one, the Court refused injunction : *Baijnath* v. *Mansukhrai*, 23 C. W. N. 258 following *McHarg* v. *Universal Stock Exchange*, (1895) 11 T. L. R. 409. Similarly Rankin, J., has held in *Sardarmull Jessraj* v. *Agar Chand Mehata & Co.*, 23 C. W. N. 811, that

Plaintiff impeaching contract containing arbitration clause on no equitable ground but as gambling one refused injunction.

when a person denies a contract, he cannot be said to be impeaching the contract on any equitable ground. But this view was not accepted by Beaumont, C. J., though agreed to by his colleague Blackwell, J. in *Ramdas Khatau and Co.* v. *The Atlas Mills Co.*, 55 Bom. 659, where it was alleged that the contract was dissolved by war. But on similar facts Scutton, J., refused to stay the suit, although the contract contained an arbitration clause, and his judgment was affirmed on appeal : *Edward Grey and Co.* v. *Tolme and Runge*, (1914) 31 T. L. R. 137.

At what stage objection to be filed in arbitration proceedings when one denies contract altogether.

The advice given by Rankin, J., in the case of *Sardarmull Jessraj* is :—"In all these cases where a man says that he wants to deny the contract altogether, his course is to let the arbitrators do what they like, to wait till there is a question of the award being enforced, and the moment he gets notice that the award is going to be filed or has been filed to object to it" : 23 C. W. N. at p. 814.

Challenging existence or validity of arbitration agreement governed by sec. 33.

Since the passing of the Arbitration Act, 1940, challenging the existence or validity of an arbitration agreement will be governed by sec. 33. The word 'shall' makes an application mandatory.

Scope of Arbitration Agreement

True interpretation of agreement.

This must necessarily depend on true interpretation of the agreement and an illustration has already been given by reference to *Piercy* v. *Young*, (1879) 14 Ch. D. 200.

Dispute under the contract

By itself a 'dispute under the contract' will not include improper conduct for defeating the

contract : *Nobel Brothers Petroleum Production Co.* v. *Stewart*, (1890) 6 T. L. R. 378.

includes not improper conduct.

If the liability of a party depends on a fact outside the arbitration agreement, e.g. ownership of a ship, he cannot be compelled to refer the decision on this fact to arbitration : *Leathley* v. *McAndrew & Co.*, (1876) 2 Char. Cham. Cases 24.

When liability of party depends on fact outside arbitration agreement.

Where the agreement is for arbitration relating to "any question, dispute or difference," such a clause will not include a claim for rescission of the contract on the ground that it is void : *Monro* v. *Bognor Urban District Council*, (1915) 3 K. B. 167.

The case of a claim for rectification of the terms of a lease was discussed in *Printing Machinery Co. Ltd.* v. *Linotype and Machinery Ltd.*, (1912) 1 Ch. 566, where the claim was rejected. When the right to have disputes settled by arbitration depends upon the occurrence of an event e.g. the previous termination of the contract in a specified manner, there can be no arbitration to decide whether the event has occurred : *Pethick Brothers* v. *Metropolitan Water Board*, (1911) *Hudson's Building Contracts*, 4th Ed., Vol. II., p. 456. It is hoped that the illustrations given indicate sufficiently the nature of the considerations which arise in determining the question whether a particular dispute is within or outside the scope of the relevant arbitration agreement.

Agreement for arbitration relating to 'any question, dispute or difference' includes not claim for recission of contract for voidability.

Some instances are being given of expressions in arbitration agreements which have been judicially construed having regard to the setting in which they were found :—"Disputes with regard to quality of goods or on any other ground

When right to have disputes settled by arbitration depends upon occurrence of event, no

arbitration to decide whether event has really occurred.

whatsoever", the last words were construed *ejusdem generis* : *Carlisles, Nephews and Co.* v. *Ricknauth*, 8 Cal. 809 ; recital of specific disputes followed by "all disputes and differences" was not construed *ejusdem generis* : *Charleton* v. *Spencer* (1842) 3 Q. B. 693 ; "question of value and all matters in difference" was held to include legal questions : *Butler* v. *Thomas Kynnersley*, (1828) 2 Bligh N. S. 374 ; "should any dispute arise" was held to include questions of law in *Forwood* v. *Watney*, (1880) 49 L. J. Q. B. 447. By any of example two instances have been given, in one of which the rule of construction *ejusdem generis* was applied, while in the other that rule was not adopted. An instance in which the application of this rule was doubted will be found in *De Ricci* v. *De Ricci*, (1891) P. 378. Where the matter referred to was the "meaning and intention" of a charterparty, it was contended that arbitrators could only construe the charter and adjudicate upon the rights of the parties under the document, but they had no power to apply the provisions of the charter to facts which had arisen or to determine those facts. But such contention was not upheld in *Richards* v. *Payne and Co.*, (1916) 86 L. J. K. B. 937.

Instances of how some 'expressions' in arbitration agreements have been judicially construed.

Interpretation of 'expressions' has differed according to difference in language and context.

It is worthwhile remembering, when studying these authorities, that it is only too often that the interpretation of one clause is of little use in construing another. This may be due not only to the fact that the language of one arbitration clause has difference from the language used in another but also because the contexts, in which the two arbitration clauses respectively appear, are found to be relevant for interpreting

the particular clauses containing the arbitration agreement.

What Matters cannot be referred to Arbitration

Matters that cannot be referred to arbitration.

It has been seen already that executors and trustees cannot refer some matters to arbitration, but as, generally speaking, all disputes between parties may be referred to arbitration, it will be useful to see what are the exceptions to this general rule.

Matrimonial Matters

Suit for divorce or restitution of conjugal rights or claim for custody of wife cannot be referred to arbitration, while terms on which husband and wife will separate or whether there is sufficient cause for judicial separation can be subject-matter of arbitration.

As regards matrimonial matters, a suit for divorce cannot be referred to arbitration nor a suit for restitution of conjugal rights ; *Musammat Kalabatu* v. *Probh Dayal* : 45 I.C. 163 ; *Malka* v. *Sardar*, A. I. R. (1929) Lah. 394. In a Punjab case it has been held that a claim for the custody of a wife cannot be referred to arbitration : *Hira* v. *Dina* : 37 P. R. 1895 ; but matters like the terms on which husband and wife will separate can be the subject-matter of a valid reference ; *De Ricci* v. *De Ricci* : (1891) P. 378 ; *Cahill* v. *Cahill* (1883) L. R. 8 A. C. 420. Agreements of this nature are capable of specific performance : *Hart* v. *Hart*, (1881) 18 Ch. Div., 670. In *Soilleux* v. *Herbst*, (1801) 2 B. &. P., 444, the arbitration was for having a decision whether there was sufficient cause for judicial separation between husband and wife and such was held to be valid.

Insolvency Proceedings

In Insolvency matters proceedings connected therewith

In a decision under the Civil Procedure Code of 1908, second schedule, it was held that insolvency proceedings could not be referred to arbi-

cannot ordinarily be referred to arbitration, exception being made in cases of Official Assignee and Receiver under the respective Insolvency Acts.

tration : *Ladha Singh* v. *Bhag Singh*, 34 I. C., 549. But this does not mean that no matter in connection with insolvency proceedings can form the subject-matter of an award, e.g. the Official Assignee under the Presidency Towns Insolvency Act (III of 1909, sec. 68) and the Receiver under the Provincial Insolvency Act (V of 1920, sec. 59) can refer to arbitration disputes between an insolvent and his creditors. This matter will again be taken up in connection with provisions in case of insolvency contained in sec. 7 of the Arbitration Act, 1940.

But under the English Bankruptcy Act (4 and 5 Geo v. Ch. 59, S. 56) the trustee of a bankrupt may, with the permission of the Committee of Inspection for each specific case, refer any dispute to arbitration.

Charities

Matters of Public Charities can be referred to arbitration with consent of Attorney-General but in India right to succeed to trusteeship of public charity was held not referable to arbitration, while right of a person claiming to be *Mutwalli* of a *Waqf* can be subject of valid reference.

In England questions affecting charities may be referred to arbitration with the consent of the Attorney-General : *Prior* v. *Hembrow*, (1841) 10 L. J. Ex. 371, or where the Master has reported that the reference would be for the benefit of the charity : *Attorney-General* v. *Hewitt* : (1804) 9 Ves. 232. In India when a question had arisen relating to the right to succeed to the trusteeship of a public charity, it was held that such matter could not be referred to arbitration : *Muhammed* v. *Ahmad* : 32 All. 503 ; but in *Moazzam Ali* v. *Raza Ali*, 46 All. 856, it was held that the right of a person claiming to be the *Mutwalli* of a *Waqf* could be the subject of a valid reference. In the case of *Moazzam Ali* v. *Raza Ali* in 46 All., Walsh and Ryves, JJ. ob-

served thus :—"The Court has a kind of parental control over a minor, and a special jurisdiction over the guardian, and it cannot allow that jurisdiction to be taken out of its hands by any private arrangement between the parties. In the decision in the case of *Muhammed* v. *Ahmad* in 31 All. that principle was applied to the mere appointment of a *Mutwalli* ; and we express no opinion as to whether it was rightly applied or not. But that is not the question in this suit" : (at p. 858). A perusal of the facts of the case will show that the distinction made is not substantial and that the situation really called for an expression of opinion on the correctness or otherwise of the decision in 31 All. 503, which was founded on the earlier case in 30 All. 137.

Matters of charities referable with consent of Collector and Advocate-General.

With the consent of the Collector in the Mofussil and the Advocate-General in the Presidency towns matters relating to the management of charities may be referred : *Hashmat* v. *Siddiq*, A. I. R. (1927) A. 128.

Guardian of Minor

Guardianship of minor incapable of reference being discretionary with Court.

In case of a minor, the claim of a person to be appointed his guardian under the Guardians and Wards Act VIII of 1890 has been held to be incapable of reference to arbitration being discretionary matter with the Court : *Mahadeo Prasad* v. *Bindeshri Prasad*, 30 All. 137, (which has been already referred to).

Matters of Criminal Nature

The law, as stated in *Redman on Arbitration*, p. 25, is no doubt correct as a general proposition, namely, where the subject is clearly illegal, or

Matters clearly illegal or purely criminal cannot be referred to arbitration.

so purely criminal that it cannot under any circumstances be made the subject of a civil action, or is an offence of a public nature for which no private person can recover compensation, it cannot be referred to arbitration. It may well be, however, that the offender is liable to criminal prosecution at the instance of the State or the complaint of the injured party, but at the same time the latter may have a civil remedy against him, and "where a party injured has a remedy by action as well as by indictment, nothing can deter such parties from referring the adjustment of the reparation which he has to receive to arbitration, although a criminal prosecution may have been commenced" : *Baker* v. *Townshend*, (1817) 7 Taunt. 422 ; R. v. *Bardell*, (1836) 5 A. & E. 619. Supposing A had been assaulted by B and the criminal prosecution ended in the latter's conviction, still the injured party had always a remedy for damages on account of the assault and such a matter could be referred to arbitration : *Baker* v. *Townshend*, (1817) 7 Taunt, 422 cited above ; *Elworthy* v. *Bird*, (1825) 2 Sim. & Stu. 372.

In all offences which involve some damages to injured party, parties may resort to arbitration.

In all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way that he may consider proper : *Keir* v. *Leeman*, (1844) 6 Q. B. 308, affirmed in (1846) 9 Q. B. 371. The same principle has been followed in Indian cases, namely, *Chetan Das* v. *Hari Ram* : 8 A. L. J. 498 ; *Kessowji* v. *Hurjivan*, 11 Bom. 566. The last-named case is one out of many of a similar

nature. It decided that a man to whom a civil debt was due might take securities for that debt from his debtor, even though the debt arose out of a criminal offence and he threatened to prosecute for that offence, provided he did not in consideration of such securities agree not to prosecute. When that condition is fulfilled, the amount of the debt and the form or extent of the securities to be given may be settled by arbitration, while a security or guarantee, whether from the debtor or a stranger for stifling a prosecution will be illegal, even though the matter of the security has been fixed by an award.

If object of reference is to get rid of non-compoundable offence, award unenforceable on ground of public policy.

If it appears that the object of reference to arbitration is really to get rid of a non-compoundable offence, then, on the ground of public policy, the award will be unenforceable : (see the decision of the Judicial Committee in *Kamini Kumar* v. *Birendra Nath* : 57 Cal., 1302 P. C. ; also *Rai Charan* v. *Amrita Lal* ; 11 C. L. J. 131 ; *Rameshwar* v. *Upendra Nath* : 29 C. W. N. 1029).

Proceedings under sec. 45 Cr. P. C. not referable to arbitration, although it is not illegal to refer to arbitration question of actual possession.

Disputes relating to possession of land may lead to a threatened breach of the peace and proceedings in connection therewith are governed by sec. 145 of the Criminal Procedure Code. But proceedings under sec. 145 Cr. P. C. are not referable to arbitration : *Banwari* v. *Harihar*, 32 Cal. 552. It is not illegal, however, to refer to arbitration the question of actual possession ; *Taramoni* v. *Gyanendra* : 7 C. W. N. 461 ; *Jamunadas* v. *Hanuman* : 25 C. W. N. 719.

Lunacy Proceedings

Inquisition for lunacy no subject of arbitration, although Manager can refer to arbitration matters of lunatic's estate.

Inquisition as to lunacy is a matter for the Court and cannot form the subject of arbitration, but it is within the power of the Court under sec. 48 of the Lunacy Act IV of 1912 to authorise the Manager to have arbitration proceedings in relation to the estate of the lunatic.

Executors and Administrators

What matters can be referred have been discussed in connection with "Who may refer to Arbitration".

Public Rates

Questions of Public Rates cannot form subject-matter of arbitration.

The validity of a poor rate and the costs of appealing against it being referred to arbitration, an award was made on both these matters. It was held that the matter of the poor rate could not be the subject of a valid reference and the matter of costs was merely accessory to the principal question. The whole award was consequently set aside : *Throp* v. *Cole*, (1835) 5 L. J. (N. S.) Ex. 281. The Indian cases on similar point are : *Yegnarama* v. *Gopalan* 47 I. C. 548 and *Venkatachalum* v. *Ramanathan*, 70 I.C. 410.

Effect of Arbitration Agreement whereby Arbitration is made Condition Precedent to the Bringing of Action

Parties can validly agree that no action to be brought until award has been made beforehand.

It has been pointed out in the leading case of *Scott* v. *Avery*, (1856) 25 L. J. Ex. 308, that parties may validly agree that no action shall be brought until an award has been made. Elucidation of the principle involved may be made by reference to a decision of the House of Lords, namely, *Atlantic Shipping and Trading Co.* v.

Louis Dreyfus & Co. (1922) 2 A. C. 250, the arbitration clause in which was to the effect :— "Any claim must be made in writing and claimants' arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred." The charterers brought a suit for damages to the linseed by reason of the unseaworthiness of the ship. At the trial Rowlatt, J. held that the procedure set out in the arbitration clause was (1) a condition precedent to the bringing of any action ; (2) the arbitration clause applied even if the ship was unseaworthy. On appeal, Bankes, Warrington and Atkin, L., JJ. agreed with Rowlatt, J. as to the construction of the arbitration clause, but reversed his judgment on the ground that the clause was against public policy, as the effect of it was to oust the jurisdiction of the Court. Before drawing attention to the judgments in the House of Lords, it may be pointed out that in a contract of affreightment there is in law an implied condition that shipowners should provide a seaworthy ship, but in the contract on which the suit was based there was no mention of seaworthiness or unseaworthiness, and, consequently, there was no express contract between the parties affecting the law as to implied warranty of seaworthiness. Lord Dunedin said at pp. 255 and 256 of the judgment : "Under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad, as an ousting of the jurisdiction of the Courts, but that position was finally abandoned in *Scott* v. *Avery* (5 H. L. C. 811). As

I read that case, it can no longer be said that the jurisdiction of the Court is ousted by such an agreement; on the contrary the jurisdiction of the Court is invoked to enforce it, and there is nothing wrong in persons agreeing that disputes should be decided by arbitration. It follows that the clause here is not obnoxious so far as it provides for arbitration. It goes on, however, to say that if the claim is not made and the arbitration started within a certain time the claim is to be held abandoned. Now, if it were illegal to arrange that a claim should not be good unless made within a certain time I should understand the argument, but it is admitted that it is perfectly legal to make such a stipulation—it is done, e.g., every day in insurance policies—then why should it be bad because it is tacked on to a provision for arbitration instead of to an action at law? All it comes to is this: I stipulate that you shall settle your difference with me by arbitration and not by action at law, and I stipulate that you shall state your differences and start your arbitration within a certain time or you shall be held to have waived your claim. For these reasons I do not think the judgment of the Court of Appeal can be supported." It will be seen that the House of Lords differed from the Appeal Court and held that the arbitration clause was valid. They, however, affirmed the decision on quite a different ground. Rowlatt, J. has held that the arbitration clause applied, although the claim was based on the unseaworthiness of a ship, a matter not mentioned in the contract. The House of Lords held that there was no express provision in

the contract, and the claim of damages due to unseaworthiness was not based on the contract, but on the liability of implied warranty of seaworthiness or in other words, they held that the claim was dehors the contract and was not a claim based on the contract. Consequently the arbitration clause was held to be unavailable to the shipowner as an answer to a suit based on damages caused by unseaworthiness. Lord Dunedin's observation quoted above, namely, that it is not illegal to stipulate that a claim should not be made unless made within a certain time is also the law in India and a time limit for action is a valid condition and has been held to be so in Indian cases, namely, *Giridharilal Hanuman Bux* v. *Eagle Star & British Dominions Insurance Co. Ltd.*, 27 C. W. N. 955; *Baroda Spinning & Weaving Co. Ltd.* v. *Satyanarayen Marine & Fire Insurance Co. Ltd.* : 38 Bom. 344. Such a condition in effect reduces the time within which rights under a contract can be enforced and the Indian Courts have considered sec. 28 of the Indian Contract Act not only in these two cases but also on other occasions as well.

Provisions of sec. 28 Indian Contract Act.

Sec. 28 of the Indian Contract Act provides thus:—"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The Courts have come to the conclusion that agreements which provide for a release or for-

Indian Courts have come to conclusion that agreements which provide for release or forfeiture of rights under contract, if suit not brought or claim preferred within the time fixed by agreement, sec. 28 will have no application.

feiture of rights under a contract, if a suit is not brought or claim preferred within the shorter time fixed by the agreement, do not come within the mischief of sec. 28, which is directed against agreements which limit the time within which a party may enforce his rights. This principle has been confirmed not only by the two cases above referred to but also by cases, like, *South British Fire and Marine Insurance Co.* v. *Brojo-Nath*, 36 Cal. 516, in which the agreement under consideration provided that no suit or action by the assured should be maintained in any Court, unless it was instituted within six months after the loss, and that the filing of any suit after six months was to be taken as conclusive evidence against the validity of the claim. This was held to be a valid clause, but sec. 28 was not at all considered.

In *Hirabhai* v. *Manufacturers Life Insurance Co.*, 14 Bom. L. R. 741, the Court went to the length of upholding the validity of a clause which provided that—"No suit shall be brought against the Company in connection with the said policy later than one year after the time when the cause of action accrues". But that decision was very much doubted in 38 Bom. 344.

Reasoning that sec. 38 Indian Contract Act is based on Common Law open to question when Indian decisions are made accordingly.

In the case of *Giridharilal* v. *Hanuman Bux*, 27 C. W. N. 955 cited above, their Lordships were influenced by the fact that sec. 28 of the Indian Contract Act was based on the Common Law, and in the decision under the Common Law, namely, *Home Insurance Company of New York* v. *Victoria-Montreal Fire Ins. Co.*, (1907) 4 A.C. 59, a clause similar to the one under consideration

by them was held to be valid. But it is very much doubted whether in construing a section of an Indian statute such a reasoning can also be resorted to.

.. This state of the law often causes hardship, as, for instance, where in a policy of insurance the time limit is only two or three months and the assured may, for example, have been out of the country in which the fire took place or prompt action had been prevented by unusual circumstances involving delay in asking for arbitration. To remove this hardship in the English Arbitration Act of 1934, it has been enacted by section 16, sub-section 6, that "where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitration is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section, extend the time for such period as it thinks proper." This power of giving relief in cases of hardship has now been adopted in the Indian Arbitration Act, 1940, by sub-section (4) of section 37.

Hardship caused by strict interpretation of law removed by sec. 16 English Arbitration Act 1934 and by sec. 37 sub-sec. (4) of Indian Arbitration Act 1940.

It will be seen that the power of the Court to grant relief in cases where there is a time limit

for making a claim is confined to cases where this condition exists along with an agreement for reference to arbitration. Where there is no provision for arbitration, then, as Lord Dunedin has pointed out in the passages already quoted, that fixation of a time limit for making claim is perfectly legal ; but in the absence of provision for arbitration, the Court has no power, in cases of hardship, to extend the time fixed by the parties. In other words, where there is an agreement that "a claim should not be made, unless it is made within a certain time", the Court has no power to extend the stipulated time, unless its jurisdiction under the Arbitration Act, 1940, is attracted by reason of the existence of an arbitration clause.

In absence of provision in arbitration agreement Court has ordinarily no power in cases of hardship to extend time fixed by parties.

Numerous authorities may be found on the question whether a particular clause amounts to a condition precedent to the institution of a suit or not, but it is to be remembered that in each case it is a question of construction of the particular clause, which obvious proposition has been affirmed by the Judicial Committee in *Arthur* v. *MacDonald* : 64 M. L. J. 284 P. C.

Whether particular clause amounts to condition precedent to institution of suit or not depends upon construction of particular clause.

Attempts have been made to enunciate what the test is for ascertaining whether an arbitration clause amounts or not to a condition precedent to the institution of a suit. It has sometimes been said that the test is where the arbitration clause is merely collateral or the parties have agreed that the liability is to arise only after there has been an award of an arbitrator. This excellent proposition does not carry the matter very far. To illustrate the difficulty which arises in answering the question whether the arbitra-

Tests for ascertaining whether arbitration clause amounts to condition precedent to institution of suit.

tion clause amounts to a condition precedent or not, reference may be made to *Hallen* v. *Spaeth* : (1923) A. C. 684. This was a case between a lessor and a lessee and the lessor agreed that at the end of the term he would purchase "by valuation buildings erected by the said lessee" with reference to arbitration if the parties were unable to agree to the valuation. At the end of the term the lessor was given possession and the lessee sued him to recover the value of the buildings, there having been no agreement as to the valuation or any arbitration. The Chief Justice of the Supreme Court of Fiji made the valuation himself and gave a decree for over £1,000. On appeal Viscount Haldane said : (at p. 689) that "the learned Chief Justice was wrong in treating the question of valuation as one which a Court had jurisdiction to try." Their Lordships interpreted the arbitration clause as meaning that "the amount of the valuation is to be such as may be determined in an arbitration. For then and not until then does a sum, which has to be ascertained in that fashion, become due and capable of affording a right of action. The determination of this sum is not a matter of independent right for which a claimant can go to the Court. He is entitled only to what the arbitrators award. If this construction be the true one it brings the case within the principle of *Scott* v. *Avery* : (1856) 5 H. L. C., 811, which decided that while by the Common Law parties could not contract validly to oust the Courts of their jurisdiction, they could contract that no right of action should accrue until the third person had decided

the amount to which there was to be a right." As has been stated already the authorities on this matter are numerous, and without trying to be exhaustive some instances are given from reported decisions which follow the principle laid down in *Scott* v. *Avery* : (1856) 5 H. L. C., 811. In *Viney* v. *Bignold*, (1887) 20 Q. B. D. 172, the policy under consideration contained a clause whereby parties were required to submit to arbitration the adjustment of the loss payable under the policy with the provision that the award should be conclusive evidence of the amount of loss and that the assured would not be entitled to commence any action, until the amount had been ascertained by the arbitrators, and that only for the amount awarded. This was held to be a complete answer to an action by the assured commenced before there had been an award in terms of the agreement. This is one of the cases in which it has been said that the test is whether there is an absolute covenant to pay, with a collateral provision that the amount shall be fixed by arbitration or a conditional covenant to pay only such amount as will be awarded —a test which, as already remarked, is not always easy of application. It has been pointed out that the condition precedent for arbitration was held to have been rendered ineffective in *Jureidini* v. *National British etc. Insurance Co.* (1915) A. C. 499, by reason of the Insurance Company insisting on arson as a ground for repudiating the policy, but it had been held previously in cases, like *Trainor* v. *Phoenix Fire Assurance Co.*, (1892) 65 L. T. 825 and *Kenworthy* v. *Queen Insurance Co.* (1892) 8 T. L. R.

211, that mere preferment of a charge of fraud would not affect the agreement making arbitration condition precedent to the commencement of the suit.

Where condition for arbitration held merely collateral and independent of covenant.

An example of the condition for arbitration being held to be merely collateral and independent of the covenant to pay will be found in *Dawson* v. *Fitzgerald*: (1876) 1 Ex. D 257, where the tenant covenanted not to keep such a quantity of rabbits and hares as would be injurious to the crops, and if he did that, then he would pay reasonable compensation, the amount to be settled in case of difference by arbitration. In this view the lessor's suit for compensation was held to be maintainable although no recourse was had to arbitration proceedings. On the subject of arbitration being condition precedent to commencement of action, without entering into the details of the facts involved in each case, reference is given to some of them for consideration by those who deserve to pursue the matter further for finding instances of the application of the principles which have been stated, namely :— *Roper* v. *Lenden*, (1859) 1 E. & E. 825 ; *Collins* v. *Tocke*, (1879) 4 A. C. 674 ; *Westwood Co.* v. *Secretary of State for India*, (1862) 7 L. T. 736. In connection with the result in *Jureidini's* case in addition to the cases of *Trainor* v. *Phoenix Fire Assurance Co.*, (1892) 65 L. T. 825 and *Kenworthy* v. *Queen Insurance Co.*, (1892) 8 T. L. R. 211, already referred to, where a different conclusion was arrived at, the following cases deserve study for appreciating the reasons for such difference, namely—*Toronto Rail Co.* v. *Rational British etc. Insurance Co.*, (1914) 20

Com. Cas. 1 (C. A.) and Woodall v. *Pearl Insurance Co.* (1919) 1 K. B. 593.

Same result follows where engineer's or architect's certificate condition precedent.

Where instead of making arbitrator's award condition precedent to institution of suit, an engineer's or architect's certificate is made such a condition the same result would follow : *Eaglesham* v. *McMaster*, (1920) 2 K. B. 169.

Power of Court under Section 36

Court's power to extend stipulated time under sec. 37(4) of Arbitration Act 1940 read with provisions of sec. 36.

In connection with agreements which make arbitrator's award condition precedent to a suit, attention has already been drawn to Court's power to extend the stipulated time under sec. 37(4) of the Arbitration Act, 1940. Further power is given to the Court by sec. 36 which runs as follows :—"Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference."

Sec. 36 is but reproduction of sec. 3(4) of English Arbitration Act 1934.

Sec. 36 reproduces sec. 3(4) of the English Arbitration Act, 1934, and contemplates firstly of an order that the arbitration agreement shall cease to have effect as regards any particular dispute. The arbitration agreement may or may not contain a provision making an award a condition precedent to the bringing of an action. If such a provision exists in respect of any dispute which comes within the arbitration agree-

ment, the Court can further order that in respect of that dispute the provision making the award condition precedent to the bringing of an action shall cease to have effect.

Expression 'or any other law' not clear, Russell's being paraphrase of 'any other enactment.'

What is exactly intended to be done by the use of the words "or any other law" ? The explanation given in *Russell on Arbitration and Award* is a mere paraphrase of the section inasmuch as the English section uses the words "any other enactment."

Not difficult to answer in abstract the question but concrete not possible.

What is any other law or enactment under which the Court can order that the arbitration agreement shall cease to have effect as regards any particular difference ? It is not difficult to answer this question in the abstract, but it is not easy to think of any concrete case under any other law or enactment.

Whereas sec. 36 Arbitration Act 1940 applicable to statutory arbitrations only, it was expected that sec. 37 would be so treated.

By reason of the second schedule of the English Act of 1934, all the sub-sections of sec. 3 are not applicable to statutory arbitration ; whereas by reason of sec. 46 of the Arbitration Act of 1940, the sections inapplicable to statutory arbitrations are sec. 6(*1*), and secs. 7, 12, and 37. Consequently sec. 36 is applicable to statutory arbitrations. Whether this is a slip or a deliberate departure from the English Law one cannot be sure. Considering that the Indian Legislature has excluded sec. 37 from statutory arbitrations, a similar exclusion of sec. 36 could also have been expected.

Distinction between Arbitration Agreement and Agreement for Valuation

It has been seen that in *Hallen* v. *Spaeth* : (1923) A. C. 684, it was held that the Court had

Distinction between 'arbitration agreement' and 'agreement made for valuation' in *Hallen* v. *Spaeth*.

no jurisdiction to value the structures, the same being a matter for the persons who were to value them. The House of Lords regarded them as arbitrators and not merely as valuators, which was also the opinion of the Court below.

Converse case arises when persons are considered merely valuators and not clothed with powers of arbitrators by reason of duties entrusted to them.

The converse case arises when persons are considered to be merely valuators and not clothed with the powers of arbitrators by reason of the duties entrusted to them. To illustrate this position reference may be made to a decision of the Calcutta High Court, namely, *Macnaghten* v. *Rameshwar* : 30 Cal. 831, where the lease contained the following clause, namely:—"At the expiration of the period of the lease, in the event of a new lease not being given, the lessor shall be at liberty to resume direct possession of the land demised, and to take over all the buildings then standing thereon at a valuation arrived at by three arbitrators." The Court came to the conclusion that the valuation made by the three persons appointed by the plaintiff was not an award within the meaning of sec. 525 of the Civil Procedure Code of 1882 and that the persons appointed were mere valuators and not arbitrators. Their Lordships referred to a number of English and Indian cases, like *Collins* v. *Collins* : (1858) 26 Bevan, 306 ; *Leeds* v. *Burrows* : (1810) 12 East. 1 ; *Chooney Money Dassee* v. *Ramkinkar Dutt* : 28 Cal. 155 ; and quoted the following passage from *In re Carus-Wilson and Greene* : (1886) 18 Q. B. D. 7 at p. 9 with approval, namely : "The question here is, whether the umpire was merely a valuer···or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a

person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation."

Test of holding judicial enquiry upheld in 8 B. & S. 100 and 15 C. B. 630.

The test of holding judicial enquiry has also been laid down *in re Hopper*, (1867) 8 B. & S. 100, and the same test was applied in *Northampton Gaslight Co.* v. *Parnell*, (1855) 15 C. B. 630.

As in Indian Acts 1899 and 1940 submission includes future differences, *ratio decidendi* in 36 Cal. 516 does not arise.

It will be remembered that in both the Indian Arbitration Acts of 1899 and 1940 a submission or arbitration agreement includes future differences, and consequently, the ratio of the decision in the case of *Macnaughten* v. *Rameshwar* in 30 Cal., so far as it rested on the distinction between settling a dispute which has arisen and deciding some matter for preventing disputes from arising, does not arise now.

Authority of valuer as distinguished from that of arbitrator where such distinction held material cannot be revoked except by consent of both parties.

The authority of a valuer as distinguished from that of an arbitrator, even where such distinction is material, cannot be revoked except by consent of both parties : *Mills* v. *Bayley*, (1863) 32 L. J. Ex. 179 ; *Northampton Gaslight Company* v. *Parnell*, (1855) 24 L. J., C. P. 60. In the last-mentioned case it was said by Williams, J. : "The stipulation in the deed, that, in case of default," *i. e.*, failure to complete the

work in three months, "the defendants should pay to the plaintiffs such sum as John Eunson should in his opinion judge to be reasonable and proper to be paid for such default," does not amount to a submission to arbitration, but is merely a stipulation that a default having taken place, the ascertainment of the sum to be paid as a satisfaction for such default shall be a condition precedent to the plaintiff's right to recover. The principle is that precisely laid in *Avery* v. *Scott*, where it is said by Coleridge, J., that: "This is like the ordinary case of a party who has a claim for work and labour under a contract by which it has been agreed that he shall be limited to what sum a third person shall certify to be due. He must get the certificate before he can bring his action. That stands upon a principle perfectly unquestioned."

Where person is really valuer but describes himself as arbitrator situation not affected.

If a person is really a valuer but describes himself as an arbitrator and his decision is one under the Arbitration Act, it makes no difference in the situation; and on the facts of the case it was held to be arbitration in *Taylor* v. *Yielding*, (1912) 56 Sol. J. 253.

Use of words 'Judge' and 'Award' does not make valuer arbitrator.

The use of the words "Judge" and "Award" does not make a valuer an arbitrator: *Kennedy Ltd.* v. *Barrow-in-Furness Corporation* (1909), *Hudson's Building Contracts*, 4th ed. Vol. II, p. 411.

Joint Arbitration Act

What are cases of joint arbitration agreements.

It has sometimes happened that submission or the arbitration agreement has been made between two persons of the one part and another of the second part of all matters of difference between them. In such a case the contention

that the submission is limited to matters that the two jointly has against the other party did not succeed and it was held that the arbitrator was empowered to decide on all matters that either of the two has against the third jointly or severally ; *Adcock* v. *Wood*, (1851) 6 Ex. 814 ; 20 L.J. Ex. 435, affirmed in error in (1852) 21 L. J. Ex. 204. Similarly where three partners gave a joint and several bond containing submission to arbitration to three other partners, and the latter gave a similar bond to the former, an award that one of three former should pay a certain sum to one of his co-obligors was held to be good : *Winter* v. *White*, (1818) 3 Moore 674.

The question whether on a reference in a cause of "all matters in difference between the parties", the parties being A of the one part and B, C & D on the other, the arbitrator must award on a difference between A and B being raised but not answered in *Rees* v. *Walters*, (1857) 16 M. & W. 263.

Effect of Death of Party to Arbitration Agreement

Effect of death of party in arbitration agreement.

The effect of death of a party is governed by sec. 6 of the Indian Arbitration Act, 1940, and will be dealt with at the proper place.

Specific Performance of Agreement to Refer to Arbitration

Sec. 21 of Specific Relief Act 1877 not specifically applicable to certain classes of contracts.

On reference to the Specific Relief Act of 1877 it will be found from sec. 21 that it enacts that certain classes of contracts cannot be specifically enforced and then proceeds to state : "And, save as provided by the Code of

Civil Procedure, and the Indian Arbitration Act of 1899, no contract to refer to arbitration shall be specifically enforced ; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Sec. 3 Indian Arbitration Act 1899 took away from application last 37 words of sec. 21 Specific Relief Act 1877 and secs. 523 to 526 C. P. Code.

By sec. 3 of the Indian Arbitration Act of 1899 it was enacted : "The last thirty-seven words of section 21 of the Specific Relief Act, 1877, and sections 523 to 526 of the Code of Civil Procedure shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply."

First proviso of sec. 3 Arbitration Act 1899 exempted pending arbitration, while second proviso exempted provisions of arbitration under Companies Act 1882.

We need not pause over the two provisos to sec. 3 of the Indian Arbitration Act of 1899 beyond stating that the first proviso saved pending arbitration and the second proviso exempted the provisions of arbitration under the Indian Companies Act VI of 1882, and the second provision was repealed by the Indian Companies Act VII of 1913.

Keeping out altogether any consideration of arbitration under the Indian Companies Act VI of 1882, we find that the net result attained was that in connection with the Indian Arbitration Act of 1899, sec. 21 of the Specific Relief Act of 1877 as amended by the former Act would read as follows :—

Sec. 21 of Specific Relief Act 1877 as amended by Arbitration Act 1899 would read :

"And, save as provided by the Code of Civil Procedure and the Indian Arbitration Act of 1899, no contract to refer present or future differences to arbitration shall be specifically enforced."

By the Arbitration Act of 1940 necessary changes have been made and in sec. 21 of the Code of Civil Procedure and the Indian Arbitration Act (1899), the word "Arbitration Act (1940)" have been substituted, and after the words "has made a contract", the words "other than an arbitration agreement to which the provision of this Act shall apply" have been inserted.

In its final form, therefore, sec. 21 will read as follows :—

"And save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced, but if any person who has made such a contract other than an arbitration agreement to which the provisions of this Act shall apply and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Sec. 21 of the Specific Relief Act 1877 as amended by Arbitration Act 1940 would thus read :

It will thus be seen that the bar to a suit, provided for in sec. 21 of the Specific Relief Act of 1877, applies to a contract to refer present or future differences to arbitration to which the Arbitration Act of 1940 does not apply. It is submitted that this is a clumsy and confusing way of enacting a provision. The method followed in dealing with sec. 21 of the Specific Relief Act of 1877 has been first to repeal the last thirty-seven words of the section and, consequently, an agreement for arbitration was no bar to a suit. The Arbitration Act of 1940 proceeded to repeal the whole of the Indian Arbitration Act of 1899, with the consequence that this repeal involved a

Bar to suit provided for by sec. 21 Specific Relief Act 1877 applies to contract to refer differences to arbitration to which Arbitration Act 1940 does not apply.

repeal of the enactment by sec. 3 of the non-applicability of the last thirty-seven words. The last thirty-seven words having thus been repealed, words have been added by the Arbitration Act of 1940 exempting agreements to which the Act applies. However, no practical change has been effected in the law, and the portion relating to specific performance of the agreement referred to remained the same as it was under the Indian Arbitration Act of 1899.

Specific Relief Act 1877 was bar to suit for specific performance of arbitration agreement, although it permitted defendant to plead existence of such agreement as bar to suit.

Put concisely the Specific Relief Act of 1877 was a bar to a suit for specific performance of an arbitration agreement, but it still permitted the defendant to plead the existence of such an agreement as a bar to the suit. The result of deletion of the last thirty-seven words from sec. 21 of the Specific Relief Act was that the defendant could not plead the existence of the arbitration agreement as a bar to the suit. The result achieved was that there could neither be specific performance nor would the arbitration agreement be a bar to the suit. The defendant's sole remedy lay in moving for the stay of the suit. On the suit being stayed, the defendant could take appropriate proceedings under the provision of the Indian Arbitration Act of 1899. If the suit is not stayed, the Court alone could adjudicate, arbitrators having become *functus officio*. This is also the position today.

Position of party to agreement to refer if the other party files suit in breach of such agreement will be dealt

The position of a party to an agreement to refer, if the other party files a suit in breach of such agreement, is a matter which will be fully discussed when sec. 34 of the Arbitration Act, 1940, is taken up—a sec. which deals with the power of the Court to stay legal proceedings

where there is an arbitration agreement. It will be seen that while there would be no order for specific performance of the agreement for arbitration, the same result is obtained by staying the suit of the party, who has brought it ignoring the provision for arbitration. After the suit has been stayed, the plaintiff will have no other course granted to him, except going before the arbitrators.

with in discussion of sec. 34 Arbitration Act 1940.

Implied Provisions: Section 3 of Arbitration Act of 1940

The discussions so far have all arisen out of sec. 2 of the Arbitration Act, 1940, which *inter alia* defines arbitration agreement. This section is followed by Chapter II, which has the caption "Arbitration without Intervention of a Court."

Section 3 in Chapter II provides that unless a different intention is expressed in an arbitration agreement, it shall be deemed to include the provisions set out in the first schedule in so far as they are applicable to the reference. This is substantially a reproduction of sec. 6 of the Indian Arbitration Act, 1899, and it will be noted that the parties can have provisions altogether inconsistent with those contained in the first schedule, inasmuch as they apply only where a different intention has not been expressed in the arbitration agreement.

Sec. 3 in Chap. II provides that it shall be deemed to include provisions in first schedule unless different interpretation is expressed in arbitration agreement.

In the first schedule there are altogether eight provisions, the first of which provides that, unless otherwise expressly provided, the reference shall be to a sole arbitration. The second provision relates to the appointment of an

First schedule consists of eight paragraphs, the first providing that reference

shall be to sole arbitration and second related to appointment of umpire.

umpire where the reference is to an even number of arbitrators. Such appointment shall be made not later than one month from the latest date of their respective appointments.

Third paragraph regulates time within which arbitrators are to make award.

The next provision in paragraph 3 regulates the time for the arbitrators making their award, namely, within four months after entering on the reference or having been called upon to act by notice in writing from any party to the arbitration agreement, or within such extended time as the Court may allow.

Fourth paragraph fixes time when umpire shall enter on reference while fifth requires umpire to make award within two months of entering on reference. Sixth deals with examination of parties and production of documents which arbitrators or umpire may call for. Paragraph seven provides that award shall be final and binding. Eighth paragraph leaves costs of reference and award to discretion of arbitrators or umpire.

Paragraph 4 fixes the time when the umpire shall forthwith enter on the reference in lieu of the arbitrators and the next paragraph requires the umpire to make his award within two months of entering on the reference, or within such extended time as the Court may allow. Paragraph 6 deals with the examination of parties and production of documents and requires the parties to do all other things which, during the proceedings on the reference, the arbitrators or umpire may call upon them to do. Paragraph 7 provides that the award shall be final and binding on the parties and persons claiming under them respectively. The last provision in paragraph 8 leaves the costs of the reference and award to the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, such costs or any part thereof, shall be paid, and tax or settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between legal practitioner and client. As most of these matters will come up later, particularly in connection with setting aside and

remission of awards, they may be left out of consideration for the moment.

Agreement for Appointment of Arbitrator by Third Party : Section 4 of Arbitration Act of 1940

Sec. 4 of Arbitration Act 1940 provides for agreement for appointment of arbitrator by third party.

This section enables the parties to refer disputes to an arbitrator or arbitrators to be appointed by a person designated in the agreement, either by name or as the holder for the time being of any office or appointment. This section is a reproduction of sec. 7 of the Indian Arbitration Act, 1899, with the words "arbitration agreement" substituted for the word "submission."

English decisions on point same as those in India although English statute contains no such provision.

While in the English statute there is no similar provision, the English decisions show that the law applicable in England is the same. At Calcutta an interesting point was raised in *Ganges Manufacturing Co.* v. *Indra Chand*, 33 Cal. 1169. There the parties agreed to a reference to arbitration of arbitrators appointed by the Bengal Chamber of Commerce, and the contention raised was that the appointment of arbitrators had to be made by an assembly of all the members of the Chamber. The Court held, however, that in such an arbitration agreement, having regard to the language of the arbitration clause, the rules of the Association are imported into the contract and that the rules framed by the Association relating to arbitration are binding on the parties. This was a sufficient answer, but in dealing with the contention that the reference was to the whole Chamber and that the Chamber had no power to delegate its authori-

ties, Harington, J. said : "Where a dispute is referred to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, it must be taken that the parties intend that the body shall carry out the arbitration in the only way in which it is possible to do so, namely, by individuals selected for the purpose." (See also *Chaitram Rambilas* v. *Bridhichand Kesrichand*, 42 Cal. 1140 ; *in re Keighley Maxsted & Co. and Durant & Co.*, (1893) 1 Q. B., 405.)

Sec. 4 deals with appointment of arbitrator by third party.

As sec. 4 of the Arbitration Act, 1940 deals with the appointment of an arbitrator by third party, it will be useful to consider who may be appointed arbitrators.

Who may be an Arbitrator

Who may be appointed arbitrator.

Any person who is under no disability by virtue of statutory provisions or reasons of public policy can be an arbitrator. Normally an impartial person must be selected ; he should have no interest directly or indirectly or even remotely in the subject-matter of the controversy or in the parties. The "interest in order to have this effect must be so remote or contingent that it cannot possibly affect his action" (*Morse on Arbitration and Award* p. 100).

Opinions differ whether infant can be appointed arbitrator. English view differs from Indian.

Whether an infant can be appointed an arbitrator is a matter over which there seems to be divided opinions as expressed in two ancient English treatises, but there is no reason for holding in India against an infant being eligible for the office of arbitrator or umpire. According to those treatises, deafness, dumbness, blindness, madness and idiocy are disqualifying

disabilities, but, as in actual practice, deaf, dumb, blind, or insane persons are not selected as arbitrators or umpire, this academic matter may safely be left alone.

Dumbness, blindness, madness, idiocy disqualifying disabilities for arbitrator.

The cases already cited in *Ganges Manufacturing Co.* v. *Indra Chand* in 33 Cal. and other reports show that reference may be made to a fluctuating body or a class persons, and in *Keighley Maxsted's* case the Appeal Committee consisted of five members elected from a fluctuating body. Also disputes may be referred to a *foreign Court* as the arbitrator : *Austrian Lloyd S.S. Co.* v. *Gresham Life Insurance Co.*, (1903) 1 K. B. 249.

Reference may be made to fluctuating body or class of persons as found in 33 Cal. 1169 as also to foreign Court as decided in 1 K. B. 249.

An unincorporated and fluctuating body, like the "Society of Inspectors of Poor for Scotland", can be validly appointed arbitrators : *Ruthven Parish* v. *Elgin Parish*, (1875) L. R. 2 H. L. Sc. 535. The Judge in the cause may be the arbitrator : *In re Durham County Permanent Building Society*, (1871) L. R. 7 Ch. 45. But in such a case the award or decision is not open to appeal. It was laid down in *Changalroya* v. *Raghava*, 37 M. L. J. 100, that such proceedings were *extra cursum curiae* and that provisions of the Civil Procedure Code, second schedule, did not apply.

Judge in case may be arbitrator but his decision or award not appealable, while intention of parties to constitute judge as arbitrator must be clear, express and unequivocal.

The rather curious judgment in *Baijnath* v. *Dhaniram*, 51 All. 903, in which a dual capacity was given to the Judge, who was regarded as both Court and arbitrator, does not appear to be sound. It is clear that no appeal lies where the decision is given by the Judge as the arbitrator : *Sayad Zain* v. *Kalabhai*, 23 Bom. 752 ; *Bahir*

Das v. *Nobin Chander*, 29 Cal. 306 and numerous other Indian authorities. Even if the Judge had no jurisdiction to deal with the suit, the parties may be bound by his decision as the arbitrator : *Subhadra* v. *Dhajadhari*, 15 C. L. J. 142. But the intention of the parties to constitute the Judge as arbitrator must be clear, express and unequivocal : *per Schwabe*, C.J. in *Sankaranarayana*, v. *Ramaswamiah*, 47 Mad. 39.

If the parties give the Court jurisdiction it does not possess and they agree to the Court taking an unusual course, not merely of deviation from the procedure if the Court has jurisdiction, it may be inferred that parties intended to give up the right of appeal : *Pisani* v. *Attorney-General*, (1874) L. R. 5 P. C. 516. In fact where the Judge deviates from the regular court procedure with consent of both sides, he gets into the position of arbitrator and ceases to be judge : *White* v. *Buccleuch* (*Duke*), (1866) L. R. 1 H. L. Sc. 70 ; *Bickett* v. *Morris*, (1866) L. R. H. L. 1 Sc. 47. These decisions do not support the decision in *Sankaranarayana* v. *Ramaswamiah*, 47 Mad. 39, where it is submitted the Court should have held that there was no right of appeal.

Parties are free to choose anybody they like as arbitrator subject to disqualification.

The principle is that the parties are free to choose anybody they like, subject to the disqualification which may attach to some selected arbitrator. Disqualification, subsequent to appointment by reason of misconduct in connection with matters or proceedings before him, is not being considered here.

Personal Interest of Arbitrator

Where the interest is known to the parties at or before the time of appointment, no com-

plaint can be made by a party who has agreed to appoint him with full knowledge of such interest. In fact, even a reference to one of the parties to the suit has been held to be valid : *Matthew* v. *Ollerton*, (1694) 4 Mod. 226, which, though a very old case, is none the worse for its age.

When parties appoint arbitrator with knowledge of his interest in matter, award will not be invalid.

Where undisclosed or concealed personal interest of the arbitrator is alleged, the Court has to consider all the material facts of the situation, the position and character of the arbitrator and the possibility of a particular arbitrator being influenced by reason of his concealed interest as well as the nature and quantum of the interest. It is not, therefore, possible to lay down any hard and fast rule. But the observation of Maclean, C.J., in *Kali* v. *Rajani*, 27 Cal. 141, that "in cases of arbitration when a person is appointed by the parties to exercise judicial duties there should be *uberrima fides* on the part of all concerned in relation to the selection and appointment of the arbitrator" lays down a principle which parties should bear in mind. For instance, the fact that the arbitrator was a shareholder in the Company, which was interested in the success of an undertaking for which the property was to be valued by the arbitrator, was not regarded as a disqualification ; *In re Elliott and South Devon Rail. Company :* (1848) 12 Jur. O.S. 445 ; whereas in *Sellar* v. *Highland Rail. Company*, (1919) 56 Sc. L. R., 216 (H. L.), a shareholder of the Railway was held to be disqualified, and shareholding was equally held to be a disqualification in *Dimes* v. *Grand Junction Canal Co.*, (1852) 3 H. L. C. 759.

When interest of arbitrator is alleged after award, Court would consider all material facts and circumstances. There must be *uberrima fides* on part of all concerned in matter of selection and appointment of arbitrator.

Different results that ensued from arbitrator being indebted to one of the parties.

On the general principle enunciated above are to be explained the different results flowing from the arbitrator being indebted to one of the parties : See *Malmesbury Rail Co.* v. *Budd*, (1876) 2 Ch. Div. 113; *Morgan* v. *Morgan*, (1832) 1 Dowl. 611 ; *Mahomed Wahiuddin* v. *Hakiman*, 29 Cal. 278 ; *Beddow* v. *Beddow*, (1878) 9 Ch. Div., 89). In the case of *Mahomed Wahiuddin* v. *Hakiman* in 29 Cal. on the matter of arbitrator's indebtedness their Lordships said :—"It is argued for the appellant that there is nothing to show whether this indebtedness existed at the time of the reference, or whether the arbitrator became indebted subsequently. If it existed at the time of the reference and was not disclosed to the defendant, that would be a good reason for the revocation of the authority given to the arbitrator. If it came into existence subsequently, that was a good reason for the letter to the arbitrator, and so upon either of these two views this indebtedness of the arbitrator to the plaintiff would also be a good reason for revocation of the reference. The fact, moreover, that it was never disclosed would be a ground for invalidating the award on account of judicial misconduct. The view we take is supported by the case of O. R. *Coley* v. *N. A. Dacosta*, 17 Cal. 200 ; *Tulsimoni Devi.* v. *Sudevi Devi*, 3 C. W. N. 361 and *Kali Prasanno Ghose* v. *Rajani Kanta Chatterji*, 25 Cal. 141." Having regard to the general proposition which has already been enunciated, it cannot thus be profitable to discuss various cases where arbitrators' interests have been held to amount to disqualification and others where the conclusion has been otherwise. In all these

cases the Judge has to apply his mind to the fact, whether having regard to all relevant circumstances, the nature and quantum of the personal interest is such that it is likely to influence the decision of the arbitrator. In additional to the authorities already referred to, the following will be found useful, namely : *Bright* v. *Riverplate Construction Co.*, (1900) 2 Ch., 835 ; *Co-operative Hindusthan Bank* v. *Bholanath*, 19 C. W. N. 165 ; Drew v. Drew, (1855) 2 Macq. 1.

This subject of disqualification of arbitrators will arise again in connection with revocation by the Court of submission and the setting aside of award.

LECTURE IV

POWER OF COURT GENERALLY IN ARBITRATION

Authority of Appointed Arbitrator or Umpire is Irrevocable Except by Leave of Court : Section 5 of Arbitration Act 1940

Sec. 5 Arbitration Act, 1940 makes irrevocable authority of appointed arbitrator or umpire except by leave of Court.

This section provides that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless the contrary intention is expressed in the arbitration agreement, whereas in sec. 5 of the Indian Arbitration Act IX of 1899 it was provided : "A submission, unless a different interest is expressed therein, shall be irrevocable except by leave of the Court."

Difference in language in 'submission' in old Act and "Arbitration agreement" in new Act.

The difference in the language is explained by what has been said already in connection with the ambiguity of the word "submission" as used in the older Acts, leading to its substitution in the latest Act by the expression "arbitration agreement."

No useful purpose served by discussion of English law on the point. Russell's summary thereof.

It will not serve any useful purpose to further discuss the English Law bearing on this matter. In *Russell on Arbitration and Award*, 13th ed. at p. 43, the position is summarised by the following quotation from Bac. Ab. Arb. B :—

"At common law the authority of an arbitrator might at any time before the award was made be revoked at the pleasure of any party to the submission, whether the submission was by agreement in writing, by bond or deed, or by the express words of the submission, for nothing

under a legislative power could make that irrevocable which was in its nature revocable, and the arbitrator being constituted and put in the place of the parties by their consent to act for them, could no longer act than he had such consent, and an award made subsequent to revocation was a nullity." The revocation of the submission after it had been made a rule of Court was a contempt and an action would lie against the party revoking. This matter has been fully explained in *Doleman's* case, (1912) 3 K. B. 357, on which is based the effect of legal proceedings on arbitration, which is the subject-matter of sec. 35 of the Act of 1940.

Indian decisions following English Common law held submission revocable at any time before award.

In India there are decisions which, following the English Common Law, have held that a submission is revocable at any time before the award has been actually made : *Ali Aiyappa* v. *Nundula*, 3 Mad. H. C. R. 82 ; *Sarubjeet* v. *Gouree Preshad*, 7 W. R. 269 ; but the English Common Law which allowed a submission to be revoked at the will of either party was not followed in *Perumalla* v. *Perumalla*, 27 Mad. 112.

Indian decisions hold that party to written submission cannot terminate it at pleasure.

On the other hand, it has been expressly laid down in other decisions, that in India it is not the law that a party to a written submission can terminate it at his pleasure : *J. G. Smith* v. *Ludha*, 17 Bom. 129 ; *Sultan Muhammad* v. *Sheo Prosad*, 20 All. 145.

Neither the consideration of the power of revocation under the English Common Law, nor the previous English legislation relating to "submission" and making it a rule of Court, is of any practical importance.

Sec. 5 in latest legislation avoided confusion by substituting "authority of an appointed arbitrator or umpire" for "of submission".

The English Arbitration Act of 1889 as well as an older statute repealed by it provided for irrevocability of submission, and this was adopted in the Indian Arbitration Act of 1899, sec. 5, and has been reproduced in sec. 5 of the Arbitration Act of 1940, taking care in order to avoid confusion to substitute "the authority of an appointed arbitrator or umpire" for the words "of submission."

Where award is set aside as ineffective, authority of arbitrators does not end thereby.

It has been held on more than one occasion that once the arbitrators make an award, their authority is ended, and if later the award is set aside, the authority of the arbitrators is not revived. The correct view is that if the award had been set aside, it means that there has been no effective award, and the authority of the arbitrators does not come to an end : (*See Rikhab* v. *Trivedi & Co.*, 51 All. 874). And there may be cases where the arbitrators can make successive awards as will be seen later on.

Revocation of Oral Submission

No law prohibiting parties verbally agreeing to refer disputes to arbitration. English statutes not being applicable to oral agreements, party can make reference abortive by revocation of authority beforehand.

It has already been pointed out that an oral agreement for reference to arbitration does not come within the operation of the Indian Arbitration Act of 1899 or of 1940, or the Civil Procedure Codes of 1882 and 1908. Consequently a party cannot move the Court for revocation of authority of an arbitrator appointed in pursuance of an oral submission. On the other hand, there is no law prohibiting parties verbally agreeing to refer disputes to arbitration. In England the statutes not being applicable to oral agreements, the Common Law applies, and any party can make the reference abortive by revoking the

authority of the arbitrator before the award has been made : (See Halsbury Laws of England, Vol. I, p. 622, foot-note I, and also p. 633).

Common law being inapplicable Indian Court required to decide according to justice, equity and good conscience.

As every doctrine of the English Common Law is not applicable here and the Court has to enquire whether a particular principle is consonant with equity, justice and good conscience, it is not expected that in India an oral agreement for reference to arbitration will be permitted to be cancelled by one party to it.

When party to oral agreement cancels agreement, aggrieved party cannot be granted specific performance thereof.

Assuming that in India a party to an oral agreement cannot cancel the agreement, it is of little practical consequence because the aggrieved party, though having a right to recover damages for breach of agreement, is likely to find it extremely difficult to prove what amount of damages he has suffered, and as previously stated, the Court cannot grant specific performance of an agreement for arbitration, whether such agreement is oral or in writing.

Action for breach of agreement lies both in England and India.

Even in England, in case of a submission which could not be made a rule of Court, an action for damages would lie for breach of agreement : *Skee* v. *Coxon*, (1830) 10 B. and C. 483 ; *Brown* v. *Tanner*, (1825) 1 C. and P. 651, and there is no reason for holding that in India such an action is not maintainable. As already pointed out such a remedy is not likely to be of any practical advantage to the aggrieved party.

In India award on oral submission not invalid.

In India, an award on oral submission, though not enforceable in the manner laid down in the statute, is not invalid : (*See Ponamma* v. *Kotamma*, 56 Mad. 85 and *Mathuradas* v. *Madan Lal*, 58 Bom. 369).

Effect of Death on Arbitration Agreement : Section 6 of Arbitration Act 1940

Sec. 6 Arbitration Act 1940 provides for effect of death of any party on arbitration agreement.

This section provides—

"(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person."

Arbitration Act 1899 contained no such provision.

There was no provision similar to this in the Indian Arbitration Act of 1899, and the present section has been adopted from the English Arbitration Act.

English Law caused revocation of reference by reason of death of any party before award.

The English law stated briefly was that the death of a party to an agreement for reference before the making of the award caused revocation of the reference, unless contrary intention was to be gathered from the agreement : (See *Toussaint* v. *Hartop*, (1817) 7 Taunt. 571 ; *Cooper* v. *Johnson*, (1819) 4 Bing. 143 ; *MacDougall* v. *Robertson*, (1827) 4 Bing. 435 ; *in re Hare Milne and Haswell*, (1839) 8 Dowl. 71. ; *Rhodes* v. *Haigh*, (1823) 2 B. & C. 345.

Where submisson had been made a rule of Court

But in England where the submission had been made a rule of Court, the death of one of the parties did not cause revocation : (See

Hara Krishna v. *Ram Gopal*: 14 C. W. N., at p. 762.

death of party caused revocation.

But where the cause of action has been extinguished by the death of a person, there could be no arbitration : *Bowker* v. *Evans*, (1885) 15 Q. B. D. 565. In this case there was an express clause that in case of death of a party, the award would be delivered to his personal representative. It was held that inasmuch as the action was in tort, the cause of action died with the plaintiff, and the provision for delivery to the personal representative was inoperative.

Where cause of action is extinguished by death of person there is no revocation.

This state of the law has been reproduced in sub-sec. 3 of sec. 6 of the Arbitration Act, 1940, and is an illustration of the application of the general principle contained in the maxim "*Actio personalis moritur cum persona.*"

Sub-sec. 3 sec. 6 Arbitration Act 1940 illustrates *actio personalis moritur cum persona.*

From what has been stated it follows that the question, whether the legal representative of a deceased party is or is not entitled to enforce the agreement to refer, depends upon whether the right to be dealt with in the reference is merely of a personal nature or is one which survives to the legal representative : (See *Manindra* v. *Mahananda*, 15 C. L. J. 360 ; *Dutta* v. *Khedu*, 33 All. 645 ; *Ranji* v. *Saligram*, 14 C. L. J. 188).

Right to be dealt with in reference of personal nature and survives to legal representative of party on demise.

In a Calcutta case, when deciding whether the authority of an arbitrator is necessarily revoked by the death of one of the parties to the arbitration, it was held that inasmuch as the hearing of the reference before the arbitrators was over, the doctrine of *nunc pro tunc* was applicable, although the award was made after

nunc pro tunc would apply when hearing of reference was over before death of party although award follows.

the death of a party : *Hara Krishna* v. *Ram Gopal* : 14 C. W. N., 759.

Legal representative of dead party to arbitration agreement can apply to set it aside.

The legal representatives of a party to an arbitration agreement, who is dead, have the right to apply to set it aside : *Lewin* v. *Holbrook*, (1843) 11 M. and. W. 110. As will be noticed from the date of this decision, this state of the law existed before there was any statutory provision with reference to the effect of death on the arbitration agreement. Such a provision was enacted in England by sec. 1 of the English Arbitration Act, 1934, and the same has been reproduced in India by sec. 6 in the Arbitration Act, 1940.

Insolvency of Party : Section 7 of Arbitration Act 1940.

Sec. 7 Arbitration Act 1940 providing for insolvency of party to agreement provides that if Receiver in Insolvency adopts agreement to which insolvent was party, same is enforceable by or against him.

This section by its sub-section (1) provides that if the Receiver in Insolvency adopts the agreement for arbitration to which the insolvent was a party, the same shall be enforceable by or against him, so far as it relates to any of the differences agreed to be referred. By sub-section (2) "where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the Receiver, may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall

be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly."

'Receiver' includes Official Assignee.

By the next sub-section the expression "Receiver" has been extended to the Official Assignee.

No express provision regarding insolvency of party in earlier legislation.

Before the Indian Arbitration Act of 1940, there was no express provision relating to arbitration in connection with the insolvency of a party. Express provision was made by sec. 2 of the English Arbitration Act of 1934, which has been adopted in sec. 7 of the Indian Arbitration Act of 1940.

Mode of law in England on point before enactment of English Act 1934.

Before this express provision in England which is in the same language as sec. 7, insolvency of a party was to be taken into consideration as a ground for granting leave to the other party for revocation of the submission : (See *Marsh* v. *Wood*, (1829) 9 B. & C. 659. Yet insolvency did not itself cause revocation of the submission, nor had the trustee in bankruptcy any authority to revoke it. (See, for example, *Andrews* v. *Palmer*, (1821) 4B. & Ald. 250 ; *Hamsworth* v. *Brian*, (1845) 1 C. B. 131 ; *Tayler* v. *Marling*, (1840) 2 M. & G. 55).

In England bankrupt held not deprived of right of contract.

In England it has also been held that the bankrupt is not deprived of his right to contract, although his estate passes to the trustee in bankruptcy and is subject to bankruptcy laws. It will appear from the case of *In re Milnes and Robertson* : (1854) 15 C. B. 451, that where a bankrupt submitted a dispute concerning a

promissory-note to arbitration and the award went against him and he was ordered to pay the costs of the reference, it was held that the bankrupt was not incapacitated from agreeing to arbitration, although the claim had passed to his estate, and he must, therefore, pay the costs awarded.

Sub-sec. 2 applies when Receiver or Official Assignee adopts not the contract.

It will be seen that sub-section (2) provides for a case to which sub-section (1) does not apply, or in other words, to a case where the Receiver or the Official Assignee has not adopted a contract.

This necessitates, without making too long a digression, explaining the adoption of contracts by the Official Assignee under the Presidency Towns Insolvency Act III of 1909, sec. 62 and 64.

Sec. 62 of Presidency Towns Insolvency Act 1909 gives Official Assignee right of disclaiming contract.

Under sec. 62 of that Act the Official Assignee has a right of disclaimer to certain contracts in circumstances set out in the section, a right which is not given under the Provincial Insolvency Act. He has got to exercise this right within twelve months after the insolvent's adjudication, but the party to the contract can force the hands of the Official Assignee, by applying to him in writing under the provisions of sec. 61 of the Act requiring him to decide whether he will disclaim. If the Official Assignee does not within 28 days, or such period as has been fixed by the Court extending the time, disclaim the contract, he shall be deemed to have adopted it.

Official Assignee's right to set aside award recognized in (1840) 2 M.G. 55.

The right of the Official Assignee to apply to have the award set aside was recognised in *Tayler* v. *Marling*, (1840) 2 M. & G. 55.

Does reference to arbitration by a person for determining his liability to a debt and its amount prevent him from getting discharge from the debt ascertained by the arbitrators by filing a petition in insolvency ? Can he include the debt on the award among debts from which he is entitled to relief under Insolvency Laws ? This question was answered in the affirmative in *R* v. *Bingham*, (1831) 2 Tyr. 46 and the award was set aside.

(1831) 2 Tyr. 46 decided whether insolvent by including debt settled by arbitration could claim relief under insolvency.

By reason of sec. 46, the provisions of sec. 7 of the Arbitration Act, 1940, are not applicable to statutory provisions.

Sec. 46 debars sec. 7 to statutory provisions.

Power of Court to Appoint Arbitrator or Umpire : Section 8 of Arbitration Act 1940

For easy reference the section is reproduced here :

"8(*1*). In any of the following cases :—

(*a*) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments ; or

Sec. 8 Arbitration Act 1940 provides for power of Court to appoint arbitrator or umpire.

(*b*) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or

the arbitrators, as the case may be, do not supply the vacancy ; or

(*c*) where the parties or the arbitrators are required to appoint an umpire and do not appoint him ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(*2*) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

How far present section has changed from corresponding section in former Indian Act 1899.

When compared with the corresponding sec. 8 of the Indian Arbitration Act of 1899, some changes will be noticed. The words in sec. 8(*1*) (*b*) were "is incapable of acting, or dies, or is removed," though the words "or is removed" are not to be found in the English Arbitration Act of 1889 on which the Indian Act of 1899 was based. The result was that in the case of removal of arbitrators by the Court, the Court, and not the parties, had the power of appointing arbitrators in their place.

In the Act of 1940 the words "or is removed" have been deleted, so that such powers as the parties may continue to have for the appointment of arbitrators under their agreement for reference are not taken away by the statute.

Parties' powers for appointment of arbitrators under agreement not taken away by deletion of "or is removed" in Act of 1940.

It will be seen that the language of sub-sec. 2 is that the Court "may" appoint an arbitrator. The point was considered in England, where also the word "may" appeared in the statute, *in re Eyre and Leicester Corporation*, (1892) 1 Q. B., 136, and it was held that although the word is "may", where the preliminary steps indicated in the section have been taken, the Court is bound as a general rule to make the appointment, and the word "may" means "must". In a later case *in re Bjornstad and the Ouse Shipping Co. Ltd.*, (1924) 2 K. B. 673, the above case was distinguished on the ground that it did not relate to a foreigner, but though not expressly dissented from, it is now unsafe to rely on the case *in re Eyre and Leicester Corpn.*, (1892) 1 Q. B. 136. Be that as it may, in India in *Gopalji* v. *Morarji*, 43 Bom., 809, the Court construed "may" as giving a discretion to the Court. In the above-mentioned case, 43 Bom., the Court, in discussing the question whether "may" means "must", made the following remarks :—

Consideration of word 'may' as used in sub-sec. 2 was made in England *in re Eyre and Leicester Corpn.*, 'may' there implying 'must', but in Bombay case *Gopalji* v. *Morarji*, 'may' was construed as discretionary.

"*In Delhi and London Bank* v. *Orchard*, 4 I. A. 127, Sir Barnes Peacock said :—"There is no doubt that in some cases the word 'must', or the word 'shall', may be substituted for the word 'may' ; but that can be done only for the purpose of giving effect to the intention of the Legislature ; but, in the absence of proof of such

intention, the word 'may' must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense" (at p. 135).

So, too, *in re Baker*, *Nichols* v. *Baker*, (1890) 44 Ch. D. 262, Cotton, L. J. said :—"I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning ; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it". *Rex* v. *Mitchell*, (1913) 1 K. B. 561 is a recent instance where the Court agreed that the above was the right principle to adopt, but differed in their application of it, the majority of the judges holding that in that particular case "may" was imperative : See also *Reg* v. *Judge Turner*, (1897) 1 Q. B. 445.

A useful change made in Arbitration Act 1940 was to remedy defect left open in Act 1899.

Another useful change has been made by the Act of 1940. In the Arbitration Act of 1899, sub-clause (*a*) had reference to the cause of one arbitrator, while sub-clause (*b*) referred to two arbitrators.

In a suit pending in a Court and governed by the Civil Procedure Code of 1908, under para. 5, the Court may appoint an arbitrator on the application of a party who had served the other party with a written notice for appointing an arbitrator. The power for appointment was confined to the following cases, namely,

(*a*) where the parties cannot agree within a reasonable time with respect to the appointment of an

arbitrator, or the person appointed refuses to accept the office of arbitrator ; or

(*b*) where an arbitrator or umpire—(i) dies, or (ii) refuses or neglects to act, or becomes incapable of acting, or (iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(*c*) where the arbitrators are empowered by the order of reference to appoint an umpire, and fail to do so, where there was no pending suit and at the same time the Indian Arbitration Act of 1899 was inapplicable, there by reason of para. 17 of the second schedule, the parties to the agreement for reference, or any of them, may apply for the agreement being filed in Court. On the agreement being filed, where no sufficient cause is shown, the Court shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, and if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator. Once this order of reference is made under para. 17, the provisions contained in paras. 1 to 16 of the schedule, so far as they are consistent with the

agreement filed under para. 17, shall be applicable to all proceedings under the order of reference made and to the award on the decree following thereon.

It will be noticed that neither the Indian Arbitration Act, 1899, nor the Civil Procedure Code 1908, dealt with the power of appointment by the Court, or with the power for parties in certain cases to supply vacancy, *e.g.*, where the reference was to more than two arbitrators.

How lacuna left open caused difficulties.

This lacuna led to difficulties as will be seen from, among others, the case of *Kunthi Ammal* v. *Sarangapani*, 54 Mad. 198, where the matter was governed by the Indian Arbitration Act of 1899 ; and in the case of *Narayanappa* v. *Ramachandrappa*, 54 Mad., 469, a case governed by the Civil Procedure Code. In the first case, the Court held that the Indian Arbitration Act of 1899 applied to a case where the arbitration was to five arbitrators, but the powers conferred by sections 8 and 9, that is, the power of appointment by the Court and that of supplying vacancy by a party, were not available to the parties to the reference. In this case the Court discussed and relied on *Manchester Ship Canal Co.* v. *Pearson & Son Ltd.*, (1900) 2 Q. B., 1606 ; *In re Smith & Service and Nelson & Sons*, (1890) 25 Q.B.D. 545 and *Gopalji Kuverjee* v. *Morarji*, 43 Bom. 809. The same conclusion was reached in the second case which was governed by the Civil Procedure Code, and their Lordships discussed various authorities relevant to the matter now under discussion, but it will not serve any useful purpose by referring to them, because what they

desired to point out was that there was a gap in the Indian Arbitration Act of 1899, which had caused difficulties, but that has now been removed by the Arbitration Act of 1940.

Case of one arbitrator and two arbitrators now met by 'where an arbitration agreement provides that the reference shall be to one or more arbitrators'.

Instead of dealing with the case of one arbitrator and two arbitrators as was done by the sub-clause 6 (*a*) and (*b*) of sec. 8 (*1*) of the Indian Arbitration Act of 1899, we have now "where an arbitration agreement provides that the reference shall be to one or more arbitrators" etc.

Curious decision on 'refusing to act' in (1892) 1 Q. B. 81

As regards "refusing to act", there is a rather curious case in (1892) 1 Q. B. 81, namely, *In re Wilson and Eastern Countries Navigaton Co.* That was a dispute between the contractors and the company employing them. The reference provided for reference to "Mr. Martineau or failing him to a person to be named by the President of the Institute of Civil Engineers." On the company moving the President, he appointed Mr. Shelford, but the latter objected to act unless he was appointed by the Court. Thereupon the company moved the Court and obtained the Court's order appointing "Mr. Shelford or some other fit and proper person to be nominated by the President." On appeal it was held that Mr. Shelford had not "refused" within the meaning of the statute and the Court's order appointing Mr. Shelford was consequently set aside.

Court cannot direct arbitrators to proceed with arbitration on their refusal, also

Surprising as it may appear a decision of Allahabad Court shows that on refusal by the arbitrators, the Court thought that it could direct the arbitrators to proceed with the arbitration. This was set aside on appeal : *Shibcharan* v.

held that arbitrators cannot introduce any terms about remuneration of arbitrator where there was no mention in first order of reference.

Ratiram, 7 All. 20. Nor can the Court on making a new appointment introduce a term about the remuneration of arbitrators, where there was no such provision in the first order of reference : *Jagannath* v. *Chhedi*, 51 All. 501. Several decisions of the Indian High Courts proceeded on the footing that if a person had not agreed to become arbitrator before he was actually appointed, his refusal to accept nomination on being appointed does not amount to "refusal" : *e.g. Bepin Behari* v. *Annoda*, 18 Cal. 324.

Although several High Courts held that if a person showed unwillingness to act as arbitrator before his actual appointment, his refusal to accept nomination on appointment would not be refusal, yet Privy Council held such interpretation wrong in *Mirza Sadiq Husain* v. *Nazir Begum*.

The Judicial Committee pointed out in *Mirza Sadiq Husain* v. *Nazir Begum*, 33 All. 743, that such a construction would defeat the provisions of the statute and said :— "What had happened in the present case was that after the arbitrator had been appointed he refused to accept office as such, or to act. It appears, however, that the Courts in India have construed this section of the Code as meaning that the section can only apply if the arbitrator who refuses had accepted office before refusing. These decisions are, *Pugardin* v. *Moidinsa*, 6 Mad. 414 and *Bepin Behari Chowdhury* v. *Annoda Prosad*, 18 Cal. 324." Their Lordships held this construction to be wrong, because 'refusal' is shown as clearly by the arbitrator's refusal to accept nomination as by any other course he could pursue.

'Incapable of Acting'

Exposition of "incapable of acting" by Russell.

According to the opinion expressed in *Russell on Arbitration and Award*, 13th Ed., p. 119, the expression 'incapable' must refer to some incapacity arising after the date of the appoint-

ment, or not known to the parties at that date. It is submitted that the Court is not entitled to treat an arbitrator as incapable whom the parties rightly or wrongly have considered to be capable. The standard of capability must be the standard of the parties who selected the arbitrator, and having selected him, they must take him for better or worse."

It is submitted that this is the correct exposition of the law.

Power of Party to Arbitration Agreement to Appoint New or Sole Arbitrator: Section 9 of Arbitration Act 1940

The previous section is concerned with appointment by the Court. But the present topic is the power of appointment of a party to an arbitration agreement.

Section 9 of the Arbitration Act of 1940 is here set out for convenience of reference :—

"9. Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,—

(*a*) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;

(*b*) if one party fails to appoint an arbitrator, either originally or by

way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who is appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court may set aside any appointment as sole arbitrator made under clause (*b*) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such orders as it thinks fit.

Explanation—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section."

Above explanation not present in corresponding sec. 9 Indian Act 1899.

The above *explanation* is not to be found in the corresponding sec. 9 of the Indian Arbitration Act, 1899. This is no doubt an improvement, and the time limit of one month is not rigid as the language used is "may constitute a neglect or refusal."

Applicability of sec. 9 depends on different

The applicability of this section depends on a different intention not having been expressed in the arbitration agreement. For instance,

where the agreement provides :—"Should either party omit to nominate an arbitrator within seven days of receipt of notice calling upon him to do so, the other party shall be at liberty to appoint both arbitrators", section 9 will have no application. See *Shaw Wallace & Co.* v. *Subbier & Sons* : 44 Mad. 406. Another instance will be found in *Sassoon & Co.* v. *Ram Dutt*, 50 Cal. 1 (P. C.)

intention not been expressed in arbitration agreement.

Where the situation attracts sec. 9(*b*), there the only course to be followed is the one stated by it. For example, in a case where the agreement was that the arbitration will be by two European merchants, one to be appointed by each party, or the Bengal Chamber of Commerce at the sellers' option, and the sellers exercised their option in favour of two merchants, but did not appoint their arbitrator, the buyers had an award made by the Bengal Chamber of Commerce. It was held that the sellers having exercised their option, there could be no arbitration by the Bengal Chamber of Commerce, and, consequently, sec. 9(*b*) was attracted in the circumstances of the case inasmuch as the buyers should have proceeded under sec. 9(*b*). The award was set aside : *Sundermull Pareshram* v. *Tribhuban Hirachand and Co*, 51 Cal. 657.

Where circumstances attract application of sec. 9(*b*), only course open is one provided thereby.

The present section provides for a notice of fifteen days in place of seven in the older Act, but the parties may have agreed to a longer time limit as in *Sukhamull* v. *Babulal*, 42 All. 525, where the parties were bound by agreement to give notice of twenty days.

Section provides for notice of *fifteen* days in place of *seven* as laid down in earlier Act.

The language of the section confines its operations to a case where the arbitration agreement

provides for a reference to two arbitrators and the other conditions have been fulfilled.

Case will not be of 'two arbitrators' where agreement provides for reference to two arbitrators with addition of 'if necessary the two arbitrators will appoint a third'.

Is it a case of "two arbitrators" where the agreement provides for a reference to two arbitrators with the addition of the provision that "if necessary the two arbitrators will appoint a third ?" It can legitimately be contended that this will not be a case of "two arbitrators," but the contrary view was accepted in *S. S. Den of Airlie Co.* v. *Mitsui & Co.*, (1912) 106 L. T. 451. The decision was under section 6 of the English Arbitration Act of 1889, of which the language was not different from that in sec. 9 of the Arbitration Acts of 1899 and 1940.

All Parties Notified in Pursuance of Provisions in Section 9(b) have Fifteen clear days time within which to make the Appointment

What happens when appointment is made within fifteen days in pursuance of sec. 9(*b*), but other party not informed of it till after fifteen days.

What happens if the appointment is made within fifteen days, but the other party is not informed of it till after fifteen days, or in other words, when the appointment made within the terms of the statute ? When is the nomination is made or when is the making of that appointment notified to the other party. This matter is concluded by English authorities based on the same language as that used in the Indian statutes ; and in *Thomas* v. *Fredricks*, (1847) 10 Q. B. 775, and *Tew* v. *Harris*, (1848) 11 Q. B. 7, it has been held that the appointment is not to be regarded as complete, until such appointment has been notified to the other side. It is also to be regarded as incomplete until such appointment has been notified to the other side. It is also to be expected that the law will require

not merely informing the other side that an appointment has been made but also as to the subject-matter and nature of the dispute. Consequently when the appointing party refused to give information to the other side what the dispute was, it was held that the other party would be justified in treating the notice given to him as defective and imporper : *Farrar* v. *Cooper*, (1890) 44 Ch. Div., 323 and *May* v. *Mills*, (1914) 30 T. L. R. 287.

As sec. 9 applies to arbitration agreements for one arbitrator by each party it has no application where parties agree to two.

Section 9 applies to arbitration agreements for the appointment of one arbitrator by each of the two parties and, consequently, can have no application where the agreement is for the parties mutually agreeing to two arbitrators. In such a case each arbitrator must be agreed to by both : *Yeates* v. *Caruth*, (1895) 2 Ir. R. 146.

Indian Court can set aside appointment of sole arbitrator under sec. 9(*b*) but has no such power when appointment made under sec. 9(*a*).

There is a defect in the Indian Arbitration Acts as compared with the English statute, inasmuch as by the proviso the Court is given power to set aside an appointment made under sec. 9(*b*), that is, the appointment of a sole arbitrator, but it has no power to set aside an appointment made under sec. 9(*a*), where the appointment is made by a party in the place of an arbitrator neglecting or refusing to act, or becoming incapable of acting or dying. Under the English statutes both classes of appointment can be set aside by the Court.

The English Arbitration Act of 1934 by sec. 6(*3*) provides :—

Provisions of sec. 6(*3*) of English Arbitration Act 1934.

"Subject to the provisions of sub-sec. (*2*) of section ten of the principal Act and to anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power

to make an award at any time," and sec. 10(2) of the previous Act, *i.e.*, the Arbitration Act of 1889 provides that "where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order." But the provisions of sec. 6(3) of the English Arbitration Act of 1934 have been omitted from the Arbitration Act of 1940.

Sec. 6(3) English Act 1934 omitted in Indian Act 1940.

The question naturally arises, what happens when an appointment is set aside by the Court. There are no provisions about it in either the English Act of 1889 or the Indian Act of 1899 ; but this omission has been made up by sec. 3 of the English Arbitration Act of 1934 and the same has been adopted in the Indian Arbitration Act of 1940 in its sec. 12, sub-sec. 2.

No provision in earlier English and Indian statutes as to what would happen when appointment was set aside by Court.

It has been seen that sec. 9 deals with the case of two arbitrators, and the absence of a provision, either in the English Act of 1889 or the Indian Arbitration Act of 1899 in case of more than two arbitrators, led to series of difficulties—a matter which requires further elaboration.

Absence of provision in English Act 1889 and Indian Act 1899 to meet more than two arbitrators led to difficulties.

In the Indian Arbitration Act of 1899, based on the English Act of 1899, the language of sec. 8(c) was :—"Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator," but the fact of a third arbitrator being brought into existence by the power given to the two arbitrators or the parties does not make it a reference to three arbitrators. Supposing the two arbitrators agree and the third arbitrator is not required, the award will be of two arbitrators and not of three.

Where parties or two arbitrators can appoint an umpire or third arbitrator and third arbitrator is inducted by two arbitrators or parties, reference will not be to three arbitrators.

This point was expressly decided *in re Smith & Service and Nelson & Sons*, (1890) 25 Q. B. D., 545, and Lindley, L. J. said: "It certainly looks like a blot in the Act, that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, ss. 4, 5 and 6 do not apply; but we cannot help that." Again, in the *United Kingdom Mutual Steamship Assurance* v. *Houston & Company*, (1896) 1 Q.B. 567, where the matter in dispute was referred to the decision of three arbitrators, it was held that all three must concur in making the award. This case decided that in an agreement to refer disputes to arbitration of three arbitrators, one to be appointed by each party, and the third by the two appointed, and one of the parties refuses to appoint an arbitrator, the Court has no power to do so. This 'blot'—the word used by Lord Lindley in the passage already quoted was removed in England by sec. 16 of the Administration of Justices Act of 1920, but in India the matter was left unattended till the passing of the Arbitration Act of 1940. It is unecessary to refer to further English authorities as the two already are quite sufficient.

Under Indian Act 1899 no provision for opinion of majority for award being valid or for meeting difficulties from third arbitrator not regarded as umpire.

In arbitrations governed by the Indian Arbitration Act of 1899, there was no provision for the opinion of the majority being sufficient for a valid award, nor was there any provision for meeting the difficulties arising from the third arbitrator not being regarded as an umpire.

Position in Indian Act

While this was the position under the Indian Arbitration Act of 1899, it was different in con-

1899 different from that in para. 4 of second schedule C.P.C. 1908.

nection with arbitrations governed by the second schedule of the Civil Procedure Code of 1908, para. 4 of which provided—

> "(4) Where the reference is to two or more arbitrators provision shall be made in the order for a difference of opinion among the arbitrators :—
>
> (*a*) by the appointment of an umpire ; or
>
> (*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail ; or
>
> (*c*) by empowering the arbitrators to appoint an umpire ; or
>
> (*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine."

Provision for award by majority of arbitrators.

Before the provision now made for the award by majority of arbitrators, if there was no provision for the award being made by majority of arbitrators, then the award would be invalid : *Gurupathappa* v. *Narasingappa*, 7 Mad. 174.

Dfference in Indian statutes has given rise to conflicting decisions.

Paragraph 4 of the second schedule quoted above was repeatedly considered by the Courts, as also the position under the Indian Arbitration Act, 1899, and many of the decisions have been discussed and reviewed in the case already referred to, namely *Kunthi Ammal* v. *Sarangapani*, 54 Mad. 198. The reference was to five arbitrators named in the agreement. One of them having declined to act, a suit was filed for enforcing the arbitration. Objection was taken that

the Indian Arbitration Act did not apply relying on *Gopalji* v. *Morarji*, 43 Bom. 809. The Court taking the same view held that secs. 8 and 9 did not apply to the case of five arbitrators, but that it does not necessarily mean that the other provisions of the Act are inapplicable. The Court agreed with the view taken *in re Babaldas Khemchand*, 45 Bom. 1, where it was held that although secs. 8 and 9 were inapplicable yet sec. 19 would apply and the suit could be stayed. The Court further held that it had no power to appoint an arbitrator under secs. 8 and 9 of the Arbitration Act, a matter which has already been mentioned. Where the reference was to three arbitrators, with a provision for decision by the majority, and one of them declined to act, it was held that the Court had no power to pass a decree on the award of the majority : *Nand Ram* v. *Fakir Chand*, 7 All. 523. This was in recognition of the principle that, even where the majority could make a valid award, it must be the judicial determination of all the arbitrators : *Ananta* v. *Jnanada*, 50 C. L. J. 323 ; *Ayyasami* v. *Appandai*, 38 M. L. J. 145 ; *Nemichand* v. *Kesarimull*, 56 M. L. J. 35 ; *Benode Lal* v. *Pranchandra*, 14 C. L. J. 143 ; *Parshottamdas* v. *Kekhushru*, 35 Bom. L. R. 1101 ; *Thammiraju* v. *Baperaju*, 12 Mad. 113.

Sec. 10 Indian Act 1940 enacted to remove anomalies.

For removing some of the difficulties which have been pointed out as also for other reasons, the Arbitration Act of 1940 has enacted section 10 :—

"(10)(*1*) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appoint-

ed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(*2*) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section 1, the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(*3*) Where an arbitration agreement provides for the appointment of arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provided, shall prevail."

First two sub-sections of sec. 10 taken from English Act 1940 deal with arbitration by three arbitrators, this being sub-divided into two classes.

The scheme of this section is quite simple. The first two sub-sections deal with the case of arbitration by three arbitrators, this being sub-divided into two classes, namely, firstly, where the agreement provides for an arbitrator appointed by each party and the third by the two appointed arbitrators, and secondly, where arbitrators are to be appointed in some different way. These two sub-sections have been taken from the English Arbitration Act of 1934, but the provision of the third sub-section dealing with the case of more than three arbitrators is absent from the English Act.

LECTURE V

REVOCATION AND CANCELLATION OF ARBITRATION AND REMOVAL OF ARBITRATORS

Power to Court to Remove Arbitrators or Umpire : Section 11 of Arbitration Act 1940

Removal of Arbitrators by Court.

So far the Act has been concerned with the appointment of arbitrators, and now the matter of their removal by the Court has to be considered, and this is dealt with by section 11 of the Indian Arbitration Act, 1940.

This section provides :—

Provisions of sec. 11 Arbitration Act 1940.

"11 (*1*) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(*2*) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(*3*) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(*4*) For the purposes of this sec. the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that

fact to the parties and to the umpire."

Sec. 16 Act 1899 provided for removal of arbitrator or umpire for misconduct.

But in the Arbitration Act of 1899, sec. 16 enacted that: "Where an arbitrator or umpire has misconducted himself, the Court may remove him."

Sec. 16 based on sec. 11 English Act 1889, latter altered by secs. 3, 6 & 15 of English Act 1934.

This was based on sec. 11 of the English Act of 1889. The law in England was altered by secs. 3, 6 and 15 of the English Arbitration Act of 1934. Any meticulous comparison of these sections in the English Arbitration Act of 1934 with the present sec. 11 is unnecessary, but it will suffice to say that the latter is based on the provisions of secs. 6 and 15 of the English Act of 1934 and sec. 16 of the Indian Arbitration Act of 1899.

"Or the proceedings" after "who has misconducted himself" deserves notice.

The first matter to be noticed is the addition of the words "or the proceedings" after the sentence "who has misconducted himself."

Russell's explanation for such addition.

According to *Russell on Arbitration and Award*, 13th Ed., p. 477, these words amending sec. 11 were "introduced to meet the case where there has been no moral turpitude on the part of the arbitrator or umpire, but only technical misconduct in relation to the proceedings."

Sec. 30 Indian Act 1940 sets out for first time that award is to be set aside when arbitrator or umpire misconducts himself or proceedings.

Later it will be found that under sec. 30 of the Indian Arbitration Act, 1940, an award is liable to be set aside on the ground "that an arbitrator or umpire has misconducted himself "or the proceedings." The authorities before this amendment show that the addition of these words was not strictly necessary and the addition has obviously been made solely for purposes of clarification and not for effecting any change in the

law. Even when the statutes did not contain the words "or the proceedings", the Courts exercised the power of removal of arbitrators by reason of their misconduct in the proceedings before them.

Sec. 11 applicable to stages before making of award, while sec. 30 comes in after award is made.

Sec. 11 is applicable to stages before the making of the award, while sec. 30, which deals with setting aside of awards, comes in after the award is to be made. Both, however, involves consideration of the matter of the arbitrators' or umpire's "misconduct," and much of what is going to be said now in connection with misconduct will be necessarily relevant under sec. 30, and a certain amount of overlapping it is impossible to avoid in dealing with the two sections ; and the treatment of "misconduct" in connection with secs. 11 and 30 should be taken as supplementary to each other.

Authorities English and Indian on subject apt to be numerous.

The authorities, as it is to be expected on this subject, both Indian and English, under the English and Indian Arbitration Acts, as also under the relevant paragraphs in the second schedule of the Civil Procedure Code of 1908 and the corresponding provisions in the Civil Procedure Code of 1882, are quite numerous.

Facts and circumstances and points of similarity or dissimilarity to be considered.

Once more the warning may be given that in applying these authorities, one must carefully consider the facts and circumstances of each and the points of similarity or difference between the facts in the decided cases and those in which the question has arisen for an answer.

Difficulty experienced in classification of authorities.

It is equally difficult to classify such of these authorities as will be referred to under mutually exclusive heads, but some attempt has got to be made to minimise the confusion likely to arise

from paying too much attention to innumerable reported cases. If we proceed with the ordinary course of arbitration after the appointment of arbitrators or umpire, we first come to the situation of their fixing date and place of hearing after proper notice to the parties and thereafter to the matter of adjournment of the hearing before them if that becomes necessary.

Duty of arbitrator or umpire is to fix proper time or place for hearing.

It is obvious that it is the duty of the arbitrator or umpire to fix a proper place and time for the hearing before him : *In re Enoch and Zaretsky, Bock & Company :* (1910) 1 K. B. 327, inasmuch as failure in this behalf may amount to legal misconduct : *Hurdwary* v. *Ahmed*, 13 C. W. N. 63.

Notice fixing date needs to be long.

The notice fixing the date must be sufficiently long : *Protapsingh* v. *Kishan Prasad & Company Ltd.*, 33 Bom. L. R. 1357.

When arbitrator exercised his discretion honestly, but not judicially, Court not to set aside award.

The Court ought not to set aside an award or remove an arbitrator on the ground that he would have exercised his judicial discretion in the matter of place or dates of meetings or their adjournments in a different way, if the arbitrator has honestly exercised his discretion : *Larchin* v. *Ellis*, (1862) 11 W. R. 281. For example, the Court refused to remove an arbitrator who fixed a date, which was a day or two subsequent to the date of departure from the country of an important witness of one of the parties, and did not agree to alter the date on the matter being brought to his notice : *In re Whitwham etc. Rail Co.*, (1895) 29 Sol. J. 692. On the other hand, the Court did interfere in *Fenn* v. *Forbes*, (1853) 20 L. T. O. S. 225, where the arbitrator, after

allowing several adjournments at the instance of the defendant for production of a witness for proving that certain machinery was worthless, peremptorily fixed a date for hearing and gave judgment for the plaintiff. These authorities only bring out the correctness of the saying that judicial discretion varies with the length of the Judge's foot. When an attempt was made to charge the arbitrator with judicial misconduct, because he did not postpone the reference to enable a party to produce a material witness, it was ruled that this fact by itself did not amount to "misconduct," the matter being entirely in the discretion of the arbitrator : *Ginder* v. *Curtis*, (1863) 14 C. B. (N. S.) 723.

Nothing sacrosanct about notice which is intended only in interest of justice.

There is nothing sacrosanct about giving of the notice. It is meant in the interest of justice, so that a willing party may not be prevented from attending at the hearing, but, on the other hand, failure to give notice may be immaterial, where a party has made it perfectly clear that, notice or no notice, he will not appear. When a party declared unequivocally that he had no desire to take part in the arbitration proceedings as in *Ram Narain Gunga Bissen* v. *Liladhur Lowjee*, 33 Cal. 1237, he could not complain afterwards of no notice having been given to him or of the arbitrator proceeding *ex parte*. In the abovementioned case, Woodroffe, J. wound up thus : "That he was called upon to do so, but he refused to have anything whatever to do with the arbitration. It is idle to suggest that after he had refused to arbitrate at all, it was necessary for the Chamber to wait any longer before proceeding with the arbitration" (at p.1241).

Arbitrators should never fail to give notice.

There can be no doubt, whatever, that arbitrators should not fail to give notice of every meeting, and reference may be made to *Scott* v. *Van Sandau*, (1844) 6 Q. B. 237, where it has been said that, though unnecessary, it is advisable to give notice of every meeting so that the recalcitrant party may have an opportunity of altering his mind and appearing at the hearing before the arbitrator if he likes.

Arbitrator not justified to proceed *ex parte* without giving absent party due notice.

It is necessary to state in the notice that if a party is absent, the arbitrator will proceed *ex parte*. *Gladwin* v. *Chilcote*, (1841) 9 Dowl. 550, is an authority for the proposition that generally speaking the arbitrator is not justified in proceeding *ex parte* without giving the party absenting himself due notice of his intention to do so.

Observations of Mookerjee, J. on operations of notice in 47 Cal. 951.

In the Calcutta case of *Udaichand Pannalall* v. *Debibux Jevanram*, 47 Cal. 951, Mookerjee, J., after referring to the above case and a few other English cases, namely, *Walter* v. *King*, (1724) 9 Mod. 63 ; *Wood* v. *Leake*, (1806) 12 Ves. 412 ; and *in the matter of Hall and Anderson*, (1840) 8 Dowl. 326 and also after referring to the statement quoted above proceeded to state that "in the absence of such an inflexible statutory provision, the procedure commended in *Gladwin* v. *Chilcote* and the other cases mentioned can be regarded only as a rule of prudence and convenience," (at p. 958) and that "the true test is, has the complainant, who takes exception to the validity of the award, been, in fact, prejudiced by the omission of the arbitrator to serve the special notice on him ? If it is established that notwithstanding such warning, he would not

have appeared before the arbitrators, he has really no grievance" (at pp. 959, 960).

In another Calcutta case the test of ascertaining when failure to give notice of proceeding *ex parte* amounts to a real grievance was formulated thus :—"It need not be disputed that arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear : *Crompton* v. *Mohan Lal*, 41 Cal. 313 ; *Sukhamal* v. *Babulal*, 42 All. 525 and *Udaichand* v. *Debibux*, 47 Cal. 951"....."If it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure" : *Bhowanidas Ramgobind* v. *Harsukhdas Balkishendas*, 27 C.W.N. 933, at p. 935.

27 C.W.N. 933 contains further elucidation of the matter.

For a case where the party had given notice to the arbitrator that he was withdrawing from the submission : *Cf. Subraya* v. *Manjunath*, 29 Mad. 44.

29 Mad. 44 exemplifies where party gives notice of withdrawal.

But parties will be well advised to make sure that there will be yet another meeting before the award is made ; but if one of them goes away from a meeting without tendering evidence or intimating his desire to do so under the mistaken belief that there will be another meeting, the arbitrator may proceed and give his award without further notice : *Tryer* v. *Shaw*, (1858) 27 L.J. Ex. 320.

If parties are under mistaken belief of meeting without proper data, arbitrator proceeding *ex parte* without notice justified.

Arbitrators will be acting wisely if they avoid the award from getting enmeshed in *dicta* of learned Judges and give notice of every

Arbitrator to give notice of meeting and to state clearly if

arbitration to proceed *ex parte*.

meeting, and also state explicitly that the arbitration will proceed *ex parte* if that is his intention.

After fixing of time and place of meeting necessity may compel arbitrator to shift time and place.

After the fixing of time and place by the arbitrator for the hearing before him, necessity may naturally arise from time to time for parties or some of them to apply for adjournment of the hearing. In this connection various authorities will be found dealing with the matter with conclusions necessarily varying with the facts of each case, and some illustrations from the reported cases have already been given therefor.

Indian Act being based on English statutes English decisions offer valuable guide.

It is, however, necessary to draw attention to the fact that the Indian Arbitration Act being based on the English Acts, the English decisions often offer valuable guide, but that there is a difference in one particular matter between the Indian Law and the English Law.

Sometimes arbitrators have refused to grant adjournment to a party for the purposes of enabling him to move the Court for having a case stated by them for the opinion of the Court.

While under Indian legislation arbitrator or umpire has power to state special case for Court's opinion, Indian Courts have no power to direct arbitrator or umpire to state special case, but

Under the Indian Law, sec. 10 of the Indian Arbitration Act of 1899, and sec. 13 (*b*) of the Arbitration Act of 1940, the arbitrators and umpire have been given power to "state a special case for the opinion of the Court on any question of law involved", and under para. 11 of the second schedule of the Civil Procedure Code of 1908, they may, "with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court." There are no powers

in the Courts in India to direct the arbitrators or umpire to state a special case, while in England the Courts have such power by reason of sec. 19 of the English Arbitration Act, 1889 and sec. 9 of the English Arbitration Act, 1934.

English Courts have such power.

The latter section provides that "an arbitrator or umpire may, and shall, if so directed by the Court, state :—(*a*) any question of law arising in the course of the reference ; or (*b*) an award or any part of an award, in the form of a special case for the decision of the Court". The mandatory part of this provision has not been adopted in the Indian Arbitration Act, 1940.

The English decisions, *in re Palmer & Company and Hosken*, (1898) 1 Q. B. 131 and *Czarnikow* v. *Roth*, (1922) 2 K. B. 478, where the arbitrators were held to be guilty of misconduct in not granting an adjournment for enabling the parties to apply in Court for the statement of a special case, are not applicable in India.

Decisions holding arbitrators guilty of misconduct for refusing adjournment to enable parties applying to Court by way of special case inapplicable in India.

It has already been pointed out that, speaking generally, matters, like the place where the arbitration will be held, the fixing of time and the granting or refusal of adjournment, are in the discretion of the umpire, and that this is in the nature of a judicial discretion, which, if exercised honestly, cannot be made a ground for challenging the award, simply because the Court in similar circumstances would have come to exercise its discretion in a different manner.

As fixing of time or granting or refusal of adjournment is entirely in judicial discretion of arbitrator, award cannot be challenged when he exercises such discretion honestly.

Coupled with the refusal of postponement there may be other circumstances, each of which taken individually may not amount to

Cumulative effect of 'arbitrator's'

conduct may suffice for finding misconduct against him.

misconduct, but the cumulative effect thereof may be sufficient for finding misconduct against the arbitrator or umpire : (*cf. In re Enoch and Zaretsky, Bock & Co.*, (1910) 1 K. B. 327.

What is "legal misconduct" ?

In connection with misconduct, it may be said speaking broadly that one of its sub-division is "legal misconduct". It is, as Russell states, an ambiguous term, though constantly used. The authorities establish that 'legal misconduct' is misconduct in the judicial or technical sense, involving no moral misconduct, like fraud or corruption. Honest but erroneous breach of responsibility which amounts to improper hearing or conduct of the reference or impropriety in making the award or any thing which leads to injustice or unfairness to the parties will amount to 'legal misconduct', though no moral misconduct or turpitude can be suggested against the arbitrators.

Indian authorities on "legal misconduct".

The Indian decisions that have held that arbitrators proceeding *ex parte* without sufficient cause, or refusing or failing to give reasonable opportunity to all parties to be heard amounts to "legal misconduct", are quite numerous, and it will be sufficient if a reference is merely made to some of them, namely, *Srimati Toolsimony* v. *Srimaty Sudevi*, 3 C.W.N. 361 ; *Louis Dreyfus* v. *Purushottam*, 47 Cal. 29 ; *Deoki* v. *Rajkumar*, 9 A.W.N. 124, besides those to which reference has already been made.

English decision on "legal misconduct".

An English decision on legal misconduct is contained in *In re Hall and Hinds*, (1841) 10 L.J.C.P 210, where Tindal, C.J. laid down :— "The mistake as a matter of carelessness is so gross, as to amount, though not in a moral point

of view yet in the judicial sense of that word, to misconduct on the part of the arbitrators" (at p. 212).

"Legal misconduct" as described in 9 All. 253 furnishes apt illustration.

The description of "legal misconduct" as given in *Ganga Sahai* v. *Lekhraj*, 9 All. 253 is very apt, inasmuch as it does not imply moral turpitude, but includes neglect of the duties and responsibilities of the arbitrators and of what the Courts of Justice expect from them before allowing finality to their awards.

Rejection of proper evidence and admission of improper evidence at hearing before arbitrators.

We have arrived at the stage when the parties have met before the arbitrators or umpire at the appointed time and place. It will be appropriate to consider now the topic of the rejection of proper evidence and the admission of improper evidence at the hearing before them. It is also to be considered how far the arbitrators are bound by the technical rules or procedure, evidence and accepted principles of law.

If arbitrator comes to erroneous but honest decision about admissibility, award not to be impeached except on ground of error of law.

Speaking generally, and subject to exceptions which will be pointed out later, the arbitrator should hear all material evidence which is tendered, but if the arbitrator comes to an honest, but erroneous decision on the question of admissibility, that by itself will not constitute misconduct for which the award will be set aside, unless error of law appears on the face of the award.

Illustrations of arbitrators bound to hear all material evidence tendered.

The subject of an award being liable to be set aside for an error apparent on the face of it will be discussed at some length later, but some illustrations are given here on the first proposition that the arbitrators are bound to hear all

material evidence tendered by the parties. The condition of being "tendered" is important, because unless specific evidence is tendered and rejected it cannot be made a ground for invalidating the award. (*cf. In re Marsh*, (1847) 16 L. J. Q. B., 330 ; *Craven* v. *Craven*, (1817) 7 Taunt., 644 ; *Glazebrook* v. *Davis*, (1826) 5 B. & C., 534 ; *Mahindra* v. *Mahananda*, 15 C. L. J., 360.)

Authorities establish that considerable latitude is to be allowed to arbitrators in admission or rejection of evidence.

It will be wrong to state as a general proposition that the arbitrators are not bound by rules of evidence. In this connection attention is drawn to the observations of Farwell, L. J., *In re Enoch and Zartesky, Bock & Co.*, (1910) 1 K.B. The Court, including Farwell, L. J., dissented from the following statement of Lord Esher in *In re Keighley, Maxsted & Co., and Bryan Durant & Co.* : (1893) 1 Q. B., 405, namely : "The parties have agreed to go before an umpire, who is not bound by the strict rules of evidence enforced in a Court, and to be bound by his decision ; and in my judgment the Court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which might alter his decision." To this statement of a general nature the Court could not agree, and Farwell, L. J. said : "If it be taken literally I can only say, with the greatest possible respect, that I think it is contrary to the law as stated in the Court of Exchequer, and contrary to the established rule in our Courts. If all that was meant—as I think—is that the Court will not be extreme to

mark anything done amiss in respect of the reception of evidence unless substantial injustice results....then I should agree. It is plain that Courts do allow considerable latitude, in practice at any rate, to the reception of evidence by umpires, but to say as a general proposition that that they are not bound by the rules of evidence appears to me to be entirely misleading and likely to produce very great injustice" (at pp. 335, 336). The authorities show that considerable latitude is given to arbitrators and Lord Coleridge, C. J., stated *In re M'Clean and Marcus*, (1890) 6 T. L. R. 355, that the Court was very unwilling to set aside an award merely on account of a supposed mistake of the arbitrators as to the admissibility of evidence. Where the arbitrator admitted some books of account in the belief that the same strictness was not required before him as in a Court of law, the Court held that this did not amount to misconduct justifying the setting aside of the award : *Hagger* v. *Baker*, (1845) 14 M. & W. 9, while where the evidence taken was wholly inadmissible and went to the root of the matter, the award was set aside : *Walford, Baker and Co.* v. *Macfie and Sons*, (1915) 84 L. J. K. B. 2221. In India also the accepted law is that the arbitrators are allowed considerable latitude as regards rejection and admission of evidence, the Courts not being too strict in compelling the arbitrators to comply with the technicalities of the rules of evidence. (cf. *Suppu* v. *Govindacharyar*, 11 Mad., 85.) Reference may also be made in this connection to *Hari Sing Nehal Chand* v. *Kankinarah Co. Ltd.*, 34 C. L. J., p. 39,

Both in England and India arbitrators required to observe procedure of law courts and to comply with rules adopted there for administration of justice.

which will also be referred to later on for some other purpose. Mookerjee, J. there said : "Now it may be conceded, as stated by Lord Halsbury in *Andrews* v. *Mitchell*, (1905) A. C. 78, that although we must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, cannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to disregard. Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice, as Lord Langdale M. R. put it in *Harvey* v. *Shelton*, (1844) 7 Beav., 455, must be equally applied in every case. One of these elementary principles is that an arbirator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents, though the rule has sometimes been ignored by mercantile arbitrators, whose awards have on this ground been set aside : *Matson* v. *Trower*, (1824) Ry. & Mo. 17 ; *In re Brook and Delcomyn*, (1864) 16 C. B. (N. S.) 403 ; *In re Camillo Eitzen and Jewson & Sons*, (1896) 40 Sol. J. 438."

Arbitrators must follow fundamental principles to do complete justice to disputants.

For the proposition that while the arbitrators may not be bound to follow all rules of practice and procedure adopted by Courts, they must follow the fundamental principles for complete justice being done to the disputants : cf. *Narsingh* v. *Ajodhya*, 15 C. L. J. 110 in addition to the authorities above referred to by Mookerjee, J.

Subject to the remarks already made,

arbitrators are required, as far as circumstances permit, to follow the procedure of Courts of law and to comply with the rules adopted in Courts for administration of justice, and this is the law both in India and England: *In re Haigh Estate*, (1861) 31 L. J. Ch., 420; *Protab Singh* v. *Kishan Pershad & Co. Ltd.*, 33 Bom. L. R., 1357. Indeed, it had been repeatedly laid down by the Courts that arbitrators are bound by the same rules of evidence as the Courts, and among the numerous authorities supporting this proposition special reference is made to two only, namely, *East & West India Docks Co.* v. *Kirk*, (1887), 12 A. C., 738; *In re Enoch and Zaretsky, Bock & Co.*, (1910) 1 K. B., 327. And such a view is confirmed by some of the authorities which have already been referred to. For instance, where depositions were admitted in evidence, which a party had no opportunity of testing by cross-examination, it was said by one of the judges: "I never understood that arbitrators were at liberty to deviate from those rules which govern the Superior Courts": *Attorney-General* v. *Davison*, (1825) M'Clel. and Y. 160 (*per* Hullock, B. at p. 782).

The various authorities already cited and further discussion of the matter in connection with setting aside of awards must be taken subject to the principle laid down in cases, like *Hagger* v. *Baker*, (1845) 14 L. J. Ex. 227, in which it was said by Pollock, B.: "If an arbitrator makes a mistake which is not apparent on the face of his award, the party injured has no redress; and there is no difference

Mistake of law by arbitrator does not furnish ground for setting aside

between a mistake in the law of evidence and in other matters. Indeed, cases like *Hagger* v. *Baker* have repeatedly affirmed the proposition that if the arbitrator acts judicially and honestly, mistake made by him in the matter of admissibility of evidence, that in itself is not in law "misconduct", though the award will be set aside if the mistake appears on the face of the award—a topic which will receive fuller treatment at another place. Some of such fundamental matters will be stated here by way of illustration, namely, that the arbitrator must not receive information from one side without the knowledge of the other and that he should not examine a witness, even if it is considered by him unimportant in the absence of one of the parties, as both sides must be heard, each in the presence of the other. This point has been discussed in some of the authorities already referred to, the *ratio* of the decision being that the irregularity of procedure may amount to no proper hearing before the arbitrator. Other illustrations will be discussed when the topic of setting aside of award is taken up for consideration.

Non-compliance of fundamental matters resulting in irregularity amounts to no proper hearing before arbitrator.

Exceptions to the general rule of the arbitrator being bound to hear all relevant evidence tendered before him may arise from various circumstances. For example, the parties may agree that the arbitrator will be at liberty to hear such evidence as he considers necessary. Such an agreement is valid and is not vitiated by any consideration of public policy. In fact, in *Tullis* v. *Jacson*, (1892) 3 Chan. 441. Chitty. J.. interpreted a clause to

Exceptions to general rule that arbitrator bound to hear all relevant evidence arise from various circumstances.

that effect to mean: "Both of us agree that every certificate given by the gentleman named shall stand firm and good and shall not be questioned even for fraud" and held that a clause having such effect was valid and binding on the parties. In the same case Chitty, J., also pointed out that if a contract had been procured by fraud between the parties, the arbitration clause would disappear as part of an invalid contract. But *Tullis* v. *Jacson* should not be taken at its face value as will appear from later discussions.

Exception also arises in another class of cases, *e.g.*, in arbitrations before Bengal Chamber of Commerce.

Exception may well arise in another class of cases, and indeed, it has arisen more than once in connection with arbitration by bodies, like the Bengal Chamber of Commerce. These cases establish that the parties are quite free to agree that the arbitrator may decide on his own knowledge or that the arbitrator will be at liberty not to take evidence. No objection can be raised to the validity of such an agreement: *Chintalpudi* v. *Chintalpudi*, 44 Mad., L.J., 263; *Lachmi* v. *Sheonath*, 42 All., 186.

The Bengal Chamber of Commerce Rules stated:

Rules XIII and XIV of Bengal Chamber of Commerce for guidance of arbitration by that body.

"XIII—Unless oral evidence beyond mere proof of documents of which the factum is not disputed is taken, it shall not be necessary to have a formal hearing of a reference before the Court (Arbitration Court), but in all cases the Court shall have power to appoint a time and place for the

hearing of references when it considers a hearing to be necessary."

"XIV.—No party to a reference shall, without express permission of the Court, be entitled to appear by Counsel, Attorney or other Advocate or Adviser, before the Court, but the Court at its discretion may, through the Registrar, require the parties, with or without witnesses, to attend before it or before any Committee or Sub-Committee of the Chamber to be examined on or without oath and solemn affirmation."

The Bengal Chamber of Commerce made an award without hearing the parties or taking evidence on the matter of market rates on the due date for calculating damages. It was contended before Buckland, J. that the arbitrator was bound to hear evidence, but the contention was negatived by the judge, who observed thus :—

Where party impeached award saying that Bengal Chamber of Commerce Arbitration Court made award without hearing parties, Rankin, C. J. overruled objection.

"There are decisions of this Court upon these rules from which it can be argued that notwithstanding the rules parties are entitled to have evidence taken in certain cases. I do not think it is necessary to express any opinion as to this" : *Bhican Chand Charoria* v. *Fogt*, 44 C.L.J. 422 at p. 423.

On appeal this judgment was confirmed and Rankin, C. J. stated thus :—

"It appears to me that the nature of the arbitration before the Bengal Chamber of Commerce is such that one is quite safe in saying that *prima facie* it is not necessary for the arbitrators to hear oral evidence about market rates which are as a rule within their own knowledge and within the special experience for which the arbitrators are selected": *Bhican Chand Charoria* v. *G. & M. Fogt*, 44 C.L.J. 422 at p. 424.

Special attention drawn to words "within the special experience for which they are selected" used by Rankin, C.J.

Attention is drawn to the words used by Rankin, C. J.: "Within the special experience for which they are selected," as it is not infrequent for the arbitrators to be selected for their special knowledge and experience of certain matters and that the rejection of evidence concerning such matters stands on a footing of its own.

42 Cal. 1140 contains another instance of incorporation of rules of Bengal Chamber of Commerce.

For another instance of the incorporation of the rules of the Bengal Chamber of Commerce into the contract and such being held binding on the parties: cf. *Chaitram Rambilas* v. *Bridhichand*, 42 Cal. 1149.

In a dispute relating to the terms and working of a mine where the arbitrators had refused to examine witnesses, Lord Cranworth, Lord Chancellor, said: "I do not think, when a matter is referred to surveyors or other persons of skill to fix the value of property to be bought or let, that the meaning is that they are necessarily to examine the witnesses; they are intrusted from their experience and observation to form a judgment which the parties referring to them agree shall be considered satisfactory. I do not therefore think in the present case it is an

In (1854) 4 DeG.M. & G. 671 where arbitrators refused to examine witnesses, Lord Chancellor held nothing was wrong if referees implied by conduct that they knew enough to decide.

objection that the referees did not examine witnesses, provided that they *bona fide* meant to say that they knew enough of the subject to decide properly without doing so" : *Eads* v. *Williams*, (1854) 4 DeG. M. &. G., 671 at p. 676 (For other authorities on similar lines, see *Ruttonsi Rowji* v. *Bombay United Spinning and Weaving Co. Ltd.*, 41 Bom., 518 : *Bottomley* v. *Ambler*, (1878) 38 L.T. 545 ; *Produce Brokers & Co.* v. *Olympia Oil Co.*, (1916) 1 A.C. 314.

Illustrations where arbitrators employed their special knowledge or skill.

The award of an arbitrator having special experience of cloth, who decided on inspection of samples only, was upheld in *Wright* v. *Howson*, (1888) 4 T.L.R. 386 ; but the Court refused to set aside an award in *Johnston* v. *Cheape*, (1817) 5 Dow. 247, where the arbitrator having technical skill and knowledge refused to hear evidence about certain facts and relied entirely on his own local knowledge. It was stated in a Bombay case that in such circumstances it was desirable for the expert arbitrator to inform the parties of the state of his personal knowledge in order to enable them to offer evidence for bringing about a modification of his views : *Daulat Sing* v. *Ratna*, 28 Bom. L.R. 986.

So far the discussion has been directed to the rejection of relevant evidence, and it now remains to consider the matter of reception of improper evidence.

Where there was reception of improper evidence. (1887) 12 A.C. 738 apt decision on point.

In *East & West India Dock Co.* v. *Kirk*, (1887) 12 A.C., 738, an arbitrator at the close of the contractor's case after the 67th hearing admitted oral evidence which tended to vary a contract in wrting. Thereupon the opposite

party obtained a rule to show cause why the submissions to the arbitrators should not be revoked on the ground that the arbitrators had admitted inadmissible evidence. The rule was, however, discharged by the original Court and the decision was confirmed on appeal. The House of Lords disagreed with this decision and Halsbury, L.C., during the course of the argument, observed thus : 'Their Lordships had no doubt that they had jurisdiction to give leave to revoke the submissions if there was reasonable ground for supposing that the arbitrator was going wrong in point of law even in a matter within his jurisdiction' (at p. 744). The contractors avoided revocation of the submission by being party to the consent order, the details of which are irrelevant for our present purpose.

Provisions of sec. 11 sub-sec. 3 analysed.

Sec. 11 of the Arbitration Act of 1940 is still under discussion and under sub-sec. 3 thereof an arbitrator or umpire, who has not used reasonable despatch in entering and proceeding with the reference, or an arbitrator or umpire, who has been removed for misconduct, is not entitled to receive any remuneration in respect of his services.

Remuneration of arbitrators or umpire unsatisfactory till 1934, when sec. 12 of English Arbitration Act dealt with it first.

This brings us to the subject of arbitrators' and umpires' remuneration or fees. The English law on the subject till 1934 was in a very unsatisfactory condition but the matter has been attended to by sec. 13 of the English Arbitration Act of 1934, the principle of which section has been adopted in the Indian Arbitration Act of 1940.

It has been held that in the absence of an express promise of remuneration, in mercantile

and business arbitrations, the appointment of an arbitrator implies a promise to remunerate him at a reasonable rate : *Brown* v. *Llandovery Terra Cotta Co. Ltd.*, (1909) 25 T. L. R. 625 ; *Tuckett* v. *Isle of Thanet Co.*, (1901) 46 Sol. J. 159.

In mercantile or business arbitrations appointment of arbitrator carries implied provision for his remuneration.

In the former case there was a reference to two arbitrators, one to be chosen by each party and to an umpire ; it was held that this involved an implied promise by the parties to jointly pay the arbitrators and the umpire ; also a provision in the arbitration agreement that the remuneration was to be settled by the arbitrators themselves was held to imply a joint promise by the parties to remunerate them. The arbitrators, however, not being parties to the agreement could not sue on this implied promise : *Bates* v. *Townley*, (1848) 2 Ex. 152.

Enunciation by Russell of law on point before English Act of 1934.

The law on the point as it existed in England before the passing of the Act of 1934 has been thus enunciated in *Russell on Arbitration and Award*, 13th Ed., p. 400 : "It is usual for the arbitrator to keep the award in his own hands until his fees have been paid by the party taking it up. This course has been approved by the Court, and is a proper one even where the party who is desirous of taking up the award is not the party who, under it, will ultimately be liable to bear the costs in question."

Arbitrator has lien for costs on award and submission.

The arbitrator has a lien for his reasonable costs on the award and submission : *In re Combs*, (1850) 4 Ex. 839 ; *Laing* v. *Todd*, (1853) 13 C. B. 276.

If party takes up award by payment of remunera-

If a party, who is not liable under the award to pay costs, makes the payment and takes up the award, he may recover it from the other

side after the payment : *Smith* v. *Troup*, (1849) 7 C. B. 757.

tion he may recover.

If the arbitrator's charges were unreasonably heavy, the party affected could come to the Court for taxation of the costs, but "this taxation was not binding on the arbitrator and give no ground to the unsuccessful party to refuse to pay the arbitrator his full fees, although the fees have been reduced on taxation between party and party" : *Llandrindod Wells Water Co.* v. *Hawksley*, (1904) 20 T. L. R., 241 (C. A.).

When arbitrators' charges are heavy or unreasonable, party can have them taxed by Court.

The parties had thus no remedy, if the arbitrator refused to deliver his award until an exorbitant fee was paid, except by the cumbrous procedure of paying the amount in full and then bringing a suit for recovering the excess over what should be a reasonable fee : *Roberts* v. *Eberhardt*, (1857) 28 L. J. C. P, 74 ; *Furnley* v. *Branson*, (1851) 20 L. J. Q. B. 178 ; *Barnes* v. *Hayward*, (1857) 1 H. & N. 742.

Previously remedy of party compelled to pay heavy arbitrators' charges was by direct suit.

The English Arbitration Act of 1934 has improved that situation by its sec. 13. If the arbitrator demands a fee excessive in the circumstances, say, £500, a party on depositing £500 in the Court can get its order on the arbitrator directing him to deliver his award to the Court. If, on taxation, £100 is found to be the reasonable fee, the Court will order £100 to be paid to the arbitrator, and the balance £400 to be paid to the party depositing the money.

Sec. 13 English Act 1934 improved position. Party who takes up award by deposit of fees charged by arbitrator in Court entitled to refund.

Under sec. 14, sub-sec. 2 of the Arbitration Act, 1940 :—"The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under

Provisions of sec. 14 sub-sec. 2 Indian Act 1940 set out how and

when arbitrator or umpire should file award and how Court should notify it to parties.

such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

Sec. 38(1) Indian Act 1940 provides that when arbitrator or umpire refuses to deliver award without payment, Court can compel him to do so.

By virtue of sec. 38(*1*) of the Arbitration Act. 1940, if the arbitrator or umpire refuses to deliver his award except on payment of fees demanded by him, the Court may order him to deliver the award on payment into Court of the fees demanded and then the Court will consider what amount shall be paid as fees and what amount is to be refunded to the applicant. When an application under this section is made, the arbitrator or umpire gets no fees until the amount thereof is fixed by the Court.

Sec. 38(*1*) of Indian Act 1940 empowers Court to decide matters without resort to taxation-proceedings.

On the Original Side of the Chartered High Courts and in appeals from the Original Side a machinery exists for taxation, but under the section there is no obligation on the Court to have the costs taxed. It can decide what is reasonable without going through the process of taxation. Outside the Chartered High Courts there is no procedure for taxation. For fixing the amount, which should be paid as fees, the obligation of the Court is to make "such enquiry, if any, as it thinks fit."

Arbitrators should also remember that if they relied on the implied promise to be paid their remuneration, they could not claim for payment unless they had made the award. They will be

entitled to nothing, if after protracted hearing, the proceedings, for some reason or other, become infructuous and no award is actually made. Under the second schedule of the Civil Procedure Code, 1908, the only provision in relation to costs is to be found in para. 13 to this effect :

Arbitrators' claim for remuneration arises when they make effective award.

"The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them."

Para. 13 C. P. C. 1908 lays down that Court should make orders for costs.

Under the provision of that paragraph, the Court has no power to deal with any costs other than the costs of the arbitration : *Arunachala* v. *Louis Dreyfus & Co.*, 54 M. L. J. 580, but if the fees of the arbitrator had not been previously fixed, the same could be done by the Court even after preparation of the decree : *Wilson* v. *Jagmandir*, 17 A. L. J. 1053.

Court had no power under that provision to deal with any other costs but costs of arbitration.

It is worth noting in this connection that under sec. 3 of the Indian Arbitration Act, 1940, unless a different intention is expressed in an arbitration agreement, the provisions of the First Schedule will apply and under para. IX of the First Schedule : "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client." It is evident, therefore, that under the First Schedule

By sec. 3 Indian Act 1940 provisions of para. 9 of First Schedule made applicable to costs of reference and award.

the arbitrator or umpire can fix the amount to be paid to him as his fees.

Observations of Coleridge, C. J. in (1892) 2 Q. B. 602 where similar question came up for decision.

In dealing with a similar section in the English Act, Lord Coleridge, C. J., remarked that he could not help thinking that parties did not know whether that provision in the First Schedule could be kept out by agreement and also observed thus : "The effect of that clause is to make arbitrators and umpires judges in their own cause, and to allow them to settle finally the amount of costs to be paid to them :" *In re Prebble and Robinson*, (1892) 2 Q. B., 602, at p. 604. Besides his Lordship also said : "It is, I think, an open question, whether an excessive and extravagant charge by an arbitrator, made by him in the award as part of the award, might not amount to such misconduct as would justify the Court in setting that award aside" (at p. 604) : See also in this connection *Fernley* v. *Branson*, (1851) 20 L. J. Q. B. 178.

Criticism of the *obiter dictum* of Coleridge, C. J.

In respect of his Lordship's *obiter dictum* in the first case, two criticisms can be offered, namely, that the award cannot be set aside, until it has been filed and that it cannot be filed, unless a party has paid the exorbitant charges, and further that if the award is set aside, all trouble and expenses incurred in connection with the arbitration will be completely thrown away.

Where costs left to discretion of arbitrators they must give clear indication of costs of reference or award.

If costs are left to the discretion of the arbitrators under the schedule they should give clear direction as to the costs of the reference or award, otherwise the award may have to be remitted to them : *In re Becker Shillan & Co. and Barry Bros.*, (1921) 1 K. B. 391, or the

award may be set aside as not being final, *Williams* v. *Willson*, (1853) 9 Ex. 90 ; *Richardson* v. *Worsley*, (1850) 5 Ex. 613.

Discretion of arbitrators to fix their remuneration must be judicious.

The discretion of the arbitrators in the matter of fixing their remuneration must be exercised judicially : *Lloyd Del Pacifico* v. *Board of Trade*, (1930) 46 T. L. R. 476.

When award contains provisions for costs, Court can make order regarding that under sec. 38 sub-sec. 3 Indian Act 1940.

If the award does not contain sufficient provision for costs, which will, of course, include fees or remuneration to be paid to the arbitrators, the Court may make such order as it thinks fit by reason of sub-sec. 3 of sec. 38 of the Arbitration Act, 1940. This sub-section does not follow sec. 12(*2*) of the English Act, 1934, which enables a party to apply to the arbitrator to amend his award by adding suitable direction as to costs.

Remuneration of arbitrator should be settled with him before hand.

Having regard to all those authorities mentioned, it is desirable that the remuneration of the arbitrator should be settled with him before he enters on the reference.

Provisions of sec. 12 of Indian Act 1940 set out powers of Court when arbitrator or umpire has been removed.

It has been seen that sec. 11 of the Arbitration Act, 1940, authorises the Court to remove arbitrators or umpires in certain circumstances. The next matter to be considered is what are the acts which the Court can do when such power has been exercised and that forms the subject-matter of sec. 12 which is reproduced below :—

> "12. (*1*) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on

the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—(*a*) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or (*b*) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement."

Sec. 12 taking its inception from English legislation of 1934 fills up a gap.

This section adopting the substance of the English Arbitration Act, 1934, fills up a gap, namely, makes provisions for the consequences of the removal of arbitrators—a gap which existed in the previous law under the Arbitration Act, 1899, and the second schedule of the Civil Procedure Code, 1908. Along with this section there needs to be considered sec. 36 of the

Arbitration Act, 1940, which gives power to the Court to practically rescind an arbitration agreement in certain circumstances.

Sec. 12 sub-sec. 1 raises question regarding time when umpire will enter on reference.

Sub-sec. 1 of sec. 12 deals with *inter alia* an "umpire who has not entered on the reference." This leads to the question as to the time when an umpire enters on the reference. There is a provision in the First Schedule of the Indian Arbitration Act, 1899, as well as in that of the Arbitration Act, 1940, according to which "IV—If the arbitrators *have allowed their time or extended time to expire* without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators." In England the underlined words have been deleted by the English Act of 1934, but no change has been made in India by the Arbitration Act, 1940. Of course the First Schedule may be excluded or modified by the terms of the arbitration agreement.

Disagreement may arise between arbitrators before signing of award.

Disagreement may arise between arbitrators before the stage of signing the award, that is to say, where one arbitrator refused to allow further evidence, while the other insisted on its production: *Cudliff* v. *Walters*, (1839) 2 Moo. & Rob. 232.

Non-agreement of arbitrators in important matters amounts to disagreement.

Even non-agreement among the arbitrators on important matters has been held to amount to disagreement in *Winteringham* v. *Robertson*, (1858) 27 L. T. Ex. 301.

In England the Courts have considered a situation like this. When the schedule was not

applicable, that is to say, when the arbitrators are required by the arbitration agreement to make their award within four months and the umpire has a time allowed to him for his umpirage later than the expiry of the four months, in such circumstances the following view of *Russell on Arbitration and Award*, 13th Ed., p. 324 will prevail: "For if the arbitrators disagree, the umpire may proceed at once with the reference, and need not wait until the time allotted to the arbitrators has expired; and his decision will be binding, even if made before the time limited for the award of the arbitrators has elapsed. The award of the umpire will, however, in such case become a nullity if the arbitrators afterwards resume their authority, agree, and make an award within the time allotted to them." The authorities cited by the learned author, namely, *Smailes* v. *Wright*, (1815) 3 M. &. S. 559; *In re Yeadon Local Board*, (1889) 41 Ch. D. 52 and *Sprigens* v. *Nash*, (1816) 5 M. & S. 193, do not seem to clearly bring out the last portion of the statement of the learned author, inasmuch the first case shows that if arbitrators disagree and declare that they will not make any award and thus renounce their power, the umpire's award will be valid, though made before the expiry of the time allotted to the arbitrators.

Russell's opinion in case of disagreement among arbitrators.

In this connection it is necessary to consider what are the questions which the umpire should decide. The umpire's scope of authority may be narrowed down by the arbitration agreement, an instance of which may be found from the clause in the agreement considered by the Court in

Lang v. *Brown*, (1855) 25 L. T. (O. S.) 297. There it was agreed that in case of the arbitrators differing in opinion, the differences were to be settled by an umpire to be appointed by them and "whatever the arbitrators or umpire shall determine in the premises by an award or awards, *interim* or final, to be pronounced by them." And the Court held that the arbitrators might make an award on some of the differences between the parties and might refer to the umpire only the differences on which the arbitrators had not agreed. But in the absence of an agreement of the kind which existed in *Lang* v. *Brown*, the umpire should decide all the matters referred to arbitration including those on which there was no difference of opinion among the arbitrators : *Winteringham* v. *Robertson*, (1858) 27 L. J. Ex., 301 ; *Wicks* v. *Cox*, (1847) 11 Jur., 542 ; *Tollit* v. *Saunders*, (1821) 9 Price, 612.

As first schedule can be excluded by agreement of parties, provision for umpire necessary.

Remembering that the First Schedule can be excluded by agreement of the parties, it will be wise to provide for the umpire to decide only the matters on which the arbitrators have disagreed, otherwise it will necessitate his hearing the matter over again.

Umpire can proceed on notes of evidence by arbitrators if no objection.

The umpire has to hear the evidence *de novo* if application is made to him to do so by either party, notwithstanding that the same evidence has already been adduced before the arbitrators and an umpire can make his award on the notes of the evidence taken by the arbitrators only if no party objects : *In re Jenkins*, (1841) 11 L. J. Q. B. 71. As was observed by Littledale, J., agreeing with Lord Denman, C. J., *In re Salkeld*

and Slater, (1840) 12 A. & E. 767 : "The Umpire is to hear all the evidence over again upon application".

Umpire's participation in arbitration proceedings no ground for setting aside.

The umpire cannot sit with the arbitrators and hear evidence, but this fact by itself will not be sufficient ground for setting aside the award, if the umpire does not interfere in any way : *Ellison* v. *Ackroyd*, (1850) 20 L. J. Q. B. 193 ; *Flag Lane Chapel* v. *Sunderland Corporation*, (1859) 5 Jur. (N. S.) 894.

Appointment of arbitrator or umpire by ballot or tossing up generally bad.

There are numerous English authorities that lay down that the appointment of umpire (or arbitrators) by ballot or tossing up is bad as being a matter of chance and not of choice : *In re Cassell*, (1829) 9 B. and C. 624. If two arbitrators each suggest a name, neither knowing the person suggested by the other, and the lots are drawn, a selection on its result is bad : *Pescod* v. *Pescod*, (1887) 58 L. T. 76 ; but where each arbitrator agrees that the name suggested by the other is of a proper person, then appointment of an umpire by drawing lots in such a case is valid : *Morgan* v. *Boult*, (1863) 11. W. R. 265 ; *In re Hopper*, (1867) L. R. 2 Q. B. 367 ; *Neale* v. *Ledger*, (1812) 16 East. 51. Appointment by drawing lots is rare, if not unknown, in India, and it will not be worthwhile to devote further time to this matter.

Position of law laid down in this section as it stood before English Act 1889 and Indian Act 1899 explained in (1912)

It will be noticed that sec. 12 gives an additional power to the Court. The position as it stood under the English Act of 1889 and the Indian Act of 1899 has thus been explained in *Doleman & Sons* v. *Ossett Corporation* : (1912) 3 K. B. 257 by Fletcher-Moulton, L. J. : "By

common law a submission to a particular arbitrator was revocable at the will of either party, unless it had been made a rule of Court, in which case the leave of the Court must be previously obtained. But this was in the nature of a recission. Such a revocation involved the breach of no contract, and gave rise to no right of damages.....I am therefore of opinion that, so soon as an action is brought in respect of a difference to which an arbitration clause applies, there is a complete breach of that clause so far as that particular dispute is concerned, and that the only right which arises directly therefrom is a claim for damages for breach of contract. The defendant may, however, apply to stay the action under the provisions of s. 4 of the Arbitration Act, 1889, but if he neglects to do so, or if the Court refuses to stay the action, the Court has the sole and exclusive jurisdiction to decide the dispute". (at pp. 270, 271).

1 K.B. 257 by Fletcher-Moulton, L. J.

The matter of stay of suit will be discussed at length later on, but what is to be pointed out in this place is that sec. 12 of the Arbitration Act, 1940, gives the Court additional power of declaring that an arbitration agreement shall cease to be operative in relation to the dispute referred to. But by reason of enactment of sec. 46 statutory arbitrations will not be governed by sec. 12.

Sec. 12 Arbitration Act 1940 gives Court power to declare that arbitration agreement shall be in operation to dispute on hand.

Powers of Arbitrators

So far the provisions for the appointment and removal of arbitrators and allied topics have been discussed, but as those are also intimately

Powers of Arbitrators.

connected with the powers and obligations of arbitrators and umpires in connection with the hearing and disposal of disputes referred to them, they need to be dealt with separately.

Sec. 13 of Indian Act 1940 sets out statutory provision thereof.

In connection with such powers the statutory provision is contained in sec. 13 of the Arbitration Act of 1940, which runs as follows :—

"13.—The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to—

(*a*) administer oath to the parties and witnesses appearing ;

(*b*) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court ;

(*c*) make the award conditional or in the alternative ;

(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission ;

(*e*) administer to any party to the arbitration interrogatories as may, in the opinion of the arbitrators or umpire, be necessary".

Sec. 13 combination of sec. 10 Indian Act 1899 and para. 11 second schedule C. P. C. 1908, both providing for special case.

This section is enacted by way of combination of sec. 10 of the Indian Arbitration Act, 1899, which substantially contained sub-clauses (*a*), (*b*) and (*d*), and sec. 15(*2*) of the same Act as regards (*c*) and para. 11 of the second schedule of the Civil Procedure Code, 1908, both of which provide for a special case being stated.

As regards the summoning of witnesses there was no provision for it in the Indian Arbitration Act, 1899, and, therefore, the arbitrators or umpire had no power to compel witnesses to appear before them and the disadvantage of such a procedure has been clearly pointed out in *Mackintosh & Co.*, v. *Scindia Steam Navigation Co.* 47 Bom. 250.

Absence of provision in Indian Act 1899 gave no authority to compel witnesses to attend before arbitrators.

The position, however, under the second schedule of the Civil Procedure Code, 1908, was different altogether, as by reason of para. 7, it was mandatory on the Court "to issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it", and defaulting parties and witnesses were subjected "to the like disadvantages, penalties, and punishments, by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court." The second schedule of the Civil Procedure Code, 1908, has been repealed by the Indian Arbitration Act, 1940, but by reason of sec. 13 the provisions of the second schedule of the Code have been substantially reproduced.

That position improved by para. 7 second schedule C. P. C. 1908.

It will be seen that the power to administer oath to parties and witnesses given by sub-clause (*a*) as also the powers given by sub-clauses (*b*) and (*e*) in sec. 13 are all discretionary and not mandatory. Does the power to administer oath include the power to administer special oath under sec. 6 of the Oaths Act 10 of 1873 ? Hopelessly conflicting opinions have been expressed by the Judges in the two cases : *Waliulla* v. *Ghulam Ali*, 1 All. 535, and *Bhagi-*

Power to administer oaths as given by sub-cls. (*a*) and (*b*) and (*e*) sec. 13 Indian Act 1940 discretionary.

Whether power to administer oath includes power to administer special oath subject of conflicting decisions.

rath v. *Ram Gulam*, 4 All., 283; some holding that as special oath could only be administered by a Court, an award, on the basis of statement on special oath, was *inter alia* no award; while others have come to contrary conclusions. It is submitted that though it is quite correct that the Oaths Act does not allow an arbitrator to administer a special oath, yet there is no reason why parties who have agreed to a special procedure should not be bound by it, or one of the parties should be allowed to recede from his agreement.

Authorities on arbitrators' power to give oath being discretionary discussed.

The language of sub-clause (*a*) is so clear about the power of an arbitrator to administer oath being discretionary, that it is unnecessary to give references to numerous authorities which will be found in connection with this matter. It will suffice to give reference to one reported case, though even that is hardly necessary, namely, *Smith* v. *Goff*, (1845) 14 M. & W. 264. By the terms of the reference liberty was given to the arbitrators to examine the witnesses and parties on oath, if they thought fit, but they refused to exercise their discretion though required to do so by one of the parties. It was held that this was within the competence of the arbitrators.

When administration of oath is dispensed with and no objection taken by parties.

If the arbitrator omits to administer oath, when the arbitration agreement makes that necessary, the defect will be remedied if parties do not raise any objection: *Biggs* v. *Hansell*, (1855) 16 C. B. 562; but where a party did ask for evidence being taken on oath, and the umpire remarked that it was not usual to do so, and the objection was not persisted in, this was held not to amount to a waiver of the objection: *Wake-*

field v. *Llanelly Rail & Dock Co.*, (1864) 34 Beav. 245.

When administration of oath incumbent, arbitrator cannot dispense with it.

If, however, the arbitration agreement requires the arbitrator to examine witnesses on oath, he has no power to be satisfied with affidavits, but must examine the witnesses *viva voce* : *Banks* v. *Banks*, (1835) 1 Gale. 46.

Arbitrator not empowered to issue commission for examination of witness but Court has such power.

Under the Indian Arbitration Act, 1899, an arbitrator had no power to issue a Commission for examination for witnesses, but under para. 7 of the second schedule of the Civil Procedure Code, 1908, the Court could, at the request of the arbitrator, issue a Commission for the examination of witnesses : *Rabiabai* v. *Rahimabai*, 7 Bom. L. R., 560. Now by reason of sec. 43 of the Arbitration Act, 1940, the position has been made exactly the same.

Sub-Clause (b) Sec. 13 : Statement of Special Case

English law compels statement of special case, but no such compulsion under Indian Law.

It has already been explained that although the arbitrator under the English law could be compelled to state a special case, where circumstances justified such a case, yet in India such compulsion is not possible. The statement of a special case under the Civil Procedure Code, 1908, second schedule, was confined to questions of law, just as it was under Indian Arbitration Act, 1899, where the words "on any question of law involved" were included. In the second schedule of the Civil Procedure Code, 1908, the language is "a special case for the opinion of the Court", and the limiting words "on any question of law" do not appear. On the strength of this provision it was contended that in references governed by

that Code, the special case need not be confined to questions of law, but it was decided in *Laxman* v. *Ramchandra*, 48 Bom. 663, that the special case must be confined to questions of law, thus establishing the uniformity of the law under the Indian Arbitration Act, 1899, and the second schedule of the Civil Procedure Code, 1908.

Whether this only on question of law or not set at rest by Indian Act 1940.

But there has been left no ambiguity in the Indian Arbitration Act, 1940, as the language in sec. 13(*b*) is "state a special case for the opinion of the Court on any question of law involved".

Sub-Clause (c) : Conditional or Alternative Award

Conditional award may be objected to if not final.

Neither in the Indian Arbitration Act, 1899, nor in the English Acts is there any express provision relating to this matter. A conditional award may be open to objection that it is not final or definite, but a conditional award may be valid where a provision is made by it for an alternative in case the condition is not fulfilled : *Halsbury's Laws of England*, 2nd. Ed., p. 664 ; *Hogg on Arbitration*, pp. 138, 139.

Extreme case of good alternative award exemplified in (1914) 2 K. B. 847.

Rather an extreme case of a good alternative award will be found in *North Riding of Yorkshire County, Council* v. *Middlesborough County Burough Council*, (1914) 2 K. B., 847. There the matter referred to arbitration was the ascertainment of the terms upon which the liability of the Burough to contribute a certain annual sum should be redeemed. The arbitrator made an award in the form of a special case with three alternatives :

(*1*) If a certain evidence was admissible, then redemption may be had on payment of 20 shillings ;

(*2*) If the evidence was inadmissible and the sum should be valued as a perpetual annuity, then the amount should be £10379 ;

(*3*) If the evidence was inadmissible and the valuation should be made on some other basis than that of a perpetual annuity, then the matter should be remitted to the arbitrator for reconsideration.

Bailhache, J., held that the evidence was admissible and remitted the matter to the arbitrator. On appeal his decision was set aside, and the Court of Appeal, having held that the evidence was admissible and that the valuation should not be on the basis of a perpetual annuity, decided that the matter should not be remitted and entered judgment for 20 shillings.

When arbitrator states special case he exhausts his powers, Court's opinion then binds both him and parties.

In this connection it is to be remembered that "he (the arbitrator) may state his award in the form of a special case. When that is done, the arbitrator has exhausted his powers ; he has made his award in such a shape that the opinion of the Court will determine the rights of the parties, and turn the award into one groove or the other" : *per* Bowen, L. J., *In re Knight and Tabernacle Permanent Building Society*, (1892) 2 Q. B., 613 at p. 618 ; *In re Kirkleatham Local Board*, etc., (1893) 1 Q. B. D. 375.

In alternative award party cannot both approbate

In the case of an alternative award, a party cannot approbate and reprobate. Where an arbitrator, in the form of a special case, made

and reprobate.

three awards on different footings and the amounts payable to the buyers were : (1) £2,000, (2) £3,745, and (3) nothing, the Judge decided that the first award was right. On that footing the buyers demanded and received £2,000, and then appealed contending that the second award, under which he would have recovered a larger sum, was the right one. But they were not allowed to raise that sort of contention : (See *Dexters, Ltd.* v. *Hillcrest Oil Co.* (*Bradford*) *Ltd*, (1926) 1 K. B. 348). Again where an award directed several alternatives, one of them being that a party should cause satisfaction to be entered on the judgment-roll in a certain action, but it appeared that there was no such action. The Court held that although it might be impossible for the party to perform certain parts of the award yet as the award in each instance gave an alternative which he could perform, the award was to be sustained : *Wharton* v. *King*, (1832) 2 B. & Ad. 528. The law on alternative award has been succinctly stated in *Simmonds* v. *Swaine*, (1809) 1 Taunt. 549 thus : "If an award directs the performance of two things, and one of them is uncertain or impossible, it is still a valid, final and certain award, if the other alternative is neither uncertain nor impossible".

Conditional Award

Some special aspects of conditional award treated in Halsbury's Laws of England, 2nd. Ed. Vol. I, 664.

It has already been indicated that though sub-clause (*c*) permits conditional awards, yet they may be hit by other considerations. For example, there may be a conditional award which is silent on what will happen if that condition is not fulfilled, or is, or has become incapable of being fulfilled. Authorities on both

aspects of the matter will be found collected in the notes to para. 1118 at p. 664 of *Halsbury's Laws of England*, 2nd. Ed., Vol. I.

Award Wholly or in Part in the Form of Special Case

Award wholly or in part in form of special case treated in (1878) 9 Ch. D. 20.

This provision has been adopted from the English Arbitration Act, 1934, and is not to be found in the English Arbitration Act, 1889, or the Indian Act, 1899, or the second schedule of the Civil Procedure Code, 1908. When the award is stated in the form of a special case, it must be final, so that on the Court deciding the question of law, one of the alternative decisions of the arbitrator automatically comes into effect : *In re Knight and Tabernacle Permanent Building Society*, (1892) 2 Q. B. 613 ; *Larrinaga* v. *Societe Franco—Americaine des Phosphates*, (1922) 92 L. J. K. B. 45—a matter which has already been touched upon generally. Where the amounts to be awarded vary depending on what particular view of the law is correct, the Court cannot proceed to find what amount is due. The Court will decide the question of law and remit the award to the arbitrator to fix the amount, where that has not been done in the statement of the special case : *Dunkirk Colliery Co.* v. *Lever*, (1878) 9 Ch. D. 20.

This statement of the law is criticised by *Russell on Arbitration and Award*, 13th Ed., p. 288, with the following observation :—

Russell's observations on statement of law on point.

"It is submitted that, provided the arbitrator decides the amount due upon his view of the law and deals with the costs, the award is

sufficiently certain, and that there is no obligation upon him to find an amount or deal with the costs in the alternative, or, still less, in many alternatives, unless, of course, by the terms of the submission, he is compelled to do so".

1878 9 Ch. D. 20 more satisfactory and desirable than Russell's view.

But it is submitted that the course indicated in *Dunkirk Colliery Co.* v. *Lever*, (1878) 9 Ch. D. 20, is more satisfactory and desirable than that permitted by the above criticism in Russell's treatise.

Correction of Clerical Mistake or Error arising from Accidental Slip or Omission

Correction of clerical error arising from accidental slip or omission lucidly dealt with by Rowlatt, J. in (1921) 1 K. B. 336.

The language used in sub-clause (*d*) in sec. 13 is "accidental slip or omission". And the contention is not sound that the word "accidental" governs only the word "slip", and, consequently, the arbitrator has power to correct omissions even if they are accidental. The difficulty of applying this section has been so lucidly pointed out by Rowlatt, J. that his statements may be quoted as containing an exposition on the construction of the section. The reference is to the case of *Sutherland & Co.* v. *Hannevig Bros.*, (1921) 1 K. B. 336, where the arbitrator awarded certain costs to a party. But the successful party being uncertain whether the award included the whole or only a part of the costs wrote to the arbitrator. In reply the arbitrator informed the party in writing that "he certainly had made an error in writing his award and had amended his award so that it should read as he originally intended to state it". He then issued another award in which he added some words making it clear that the larger

amount was included in the award. Rowlatt, J., in his judgment stated that the words in the section should be construed fairly strictly and then proceeded to say :—"Before the Arbitration Act was passed it is clear that the Courts regarded it as very dangerous to allow arbitrators to touch their awards after they had been made, and *Mordue* v. *Palmer*, (1870) L. R. 6 Chan. 22, is the well-known case upon the subject. Such a state of things has been clearly altered".

"In the present case the arbitrator made an award including therein certain costs between one of the parties and a third party, and the question arose whether the words he had used included all those costs or only some of them". The arbitrator said "that he certainly had made an error in writing his award, and he amended it so that it read, as he said, as he had originally intended it to read".

"Now that was not the correcting of a clerical mistake within the meaning of section 7 (*c*) of the Arbitration Act, 1889, which is something almost mechanical—a slip of the pen or something of that kind. But did he correct an error arising from an accidental slip or omission ? Here we get upon ground which is almost metaphysical. An accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident. What is an accident in this connection, an accident affecting the expression of a man's thought ? It is a very difficult thing to define, but I am of opinion this was not an accident within the meaning of the clause."

"I cannot pretend to give a formula which will cover every case, but in this case there was nothing omitted by accident: the arbitrator wrote down exactly what he intended to write down, though it is doubtful what that really meant when considered from a legal point of view. But what the arbitrator has really done here is to assume a jurisdiction to expound what he had purposely written down, and that, I think, he cannot do" (at pp. 340, 341).

Court can get corrected mistakes or errors not being accidental slip or omission through remission of award.

While the section has been very narrowly construed, it is to be remembered that where the arbitrator makes a mistake, not being an error or mistake within the meaning of sec. 13, the Court has ample power to do justice by remitting the award. Mistakes or errors not coming within the description "accidental slip or omission" can only be corrected if the award is remitted: *Ramji* v. *Salig Ram*, 14 C. L. J. 188.

Termination of arbitrator's powers with his making and publishing award to be construed strictly.

The doctrine that the arbitrator's power comes to an end with his making and publishing the award has been so strictly applied that when the arbitrator made his award on a rough piece of paper, and then with the consent of the parties wrote out his award on stamped paper, it was held that the latter award was void and could not be validated by the consent of parties: *Parshottamdas* v. *Kekhushru*, 35 Bom. L. R. 1101.

Arbitrator though *functus officio* after he has made award can take further evidence if he still

While, no doubt, the arbitrator becomes, *functus officio* as soon as he makes his award, still, if after the proceedings have been formally closed and before the making of the award he retains his jurisdiction, he may in his discretion reopen the proceedings and receive additional

evidence : *Bignall* v. *Gale*, (1841) 2 M. & G. 830 ; *Ringer* v. *Joyce*, (1815) 1 Marsh. 404.

retains jurisdiction.

The discussion of sec. 13 of the Arbitration Act, 1940, is really a part of a much larger topic, namely, powers and obligations of arbitrators. In addition to the powers expressly given by the statute, the arbitrator has powers which flow from his being put in the position of a Judge deciding a dispute. From this fact there arise for him various obligations, some of which have already been discussed, for example, his liability to follow the procedure of the Court, his power and obligation in the matter of accepting or rejecting evidence etc. But this does not exhaust the subject and discussions follow in some detail, without any attempt to be exhaustive, of other powers and obligations of arbitrators, by way of supplement to what has already been stated.

Discussion of sec. 13 Arbitration Act 1940 relates to powers and obligations of arbitrators.

Powers and Obligations of Arbitrators in Conducting Reference : Costs.

When all matters in dispute are referred to, has the arbitrator any power to make an award as to costs ? A summary of the position is given below, though it partially includes some matters already touched upon. He has ample power to award costs of the reference and award under cl. 8 of the First Schedule of the Arbitration Act, 1940, which corresponds to para. 9 of the First Schedule of the Indian Arbitration Act, 1899, but the First Schedule will not apply, as already pointed out, if there is a different intention expressed in the arbitration agreement. Under the Civil Procedure Code, 1908, in arbitra-

Powers and obligations of arbitrators in conducting reference and giving indications as to costs.

tion in suits by reason of para. 13 of the Second Schedule the power of awarding costs was with the Court "where the award contains no sufficient provision concerning them." Under the Code there was no provision about costs in arbitration without the intervention of a Court.

Notwithstanding this fact in a case governed by the Civil Procedure Code, 1859, sec. 322 which is similar to para. 13 of the Second Schedule of the Code of 1908, Norman, J., held that the arbitrators had power to deal with costs though the matter was not mentioned in the order of reference : *Mohanlal* v. *Nathuram*, 1 B. L. R. O. C. 144. Much later in *Mohendra* v. *Mohilal*, 27 C. L. J. 104, the Court refused to extend the principle to "private arbitration," that is, arbitration without the intervention of a Court under para. 20 of the Second Schedule of the Civil Procedure Code, 1908.

The power of arbitrators to give directions as to costs under para. 8 of the First Schedule of the Arbitration Act, 1940, extends to costs of the reference and award.

'Costs of the Reference'

The costs of reference include costs incurred in connection with the enquiry before the arbitrators and costs incurred by the arbitrators with the consent of the parties, like fees paid to accountants for examining accounts and for attendance of solicitor on the accountant : *Hawkins* v. *Rigby*, (1860) 29 L. J. C. P. 228, as well as costs of and incidental to any special case submitted by the arbitrators. 'Costs of the award' cover reasonable costs of counsel or solicitor employed by

the arbitrators in connection with the drawing up of the award : *In re Knight and Tabernacle Building Society*, (1892) 2 Q. B. 613 ; *Threlfall* v. *Fanshawe*, (1850) 19 L. J. Q. B. 334. Now by reason of sec. 38 of the Arbitration Act, 1940 : "The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision regarding them". Sec. 38 as also para. 8 of the First Schedule of the Act, where it has not been excluded, refer to "costs of an arbitration" and "costs of the reference and award" respectively. The expressions do not cover the costs of the suit where the arbitration has been ordered in a pending suit. In *Dagdusa* v. *Bhukan*, 9 Bom., 82, there was reference to arbitration in a pending suit, but no express authority was given to the arbitrator expressly to decide the liability for costs of the suit. The arbitrator directed the defendant to pay the costs of the plaintiff, but this direction was expunged from the award on the ground that this was not within the arbitrator's competence. It is submitted that in a pending suit if all matters in dispute in the suit are referred, this must necessarily include the plaintiff's claim for costs as also the defendant's contention as to the question of costs. Each case must necessarily depend on the interpretation of the terms of reference, whether the arbitration is in a pending suit, or is without the intervention of the Court, or whether the Court has merely ordered the arbitration agreement to be filed under the provisions of sec. 20 of the Arbitration Act, 1940.

Latitude given to Arbitrators

This matter has been discussed at some length in connection with the rejection or acceptance of evidence, proceedings being carried on *ex parte*.

The following observations may be taken as supplemental to what has already been set forth :—

Latitude given to arbitrators as *per* Halsbury, L. C. in (1905) A. C. 78.

In connection with the degree of latitude permitted to arbitrators, the House of Lords *per* Halsbury, L. C., has explained the position in the following words :—"We must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, to give every effect to their decisions ; on the other hand, there are some principles of justice which it is impossible to disregard, and, giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily.....and the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might lead to injustice" (at p. 80).

Those observations were made in the case where the arbitrator's decision expelling a member of a friendly society gave the latter no opportunity to meet the charges preferred against him : *Andrews* v. *Mitchell*, (1905) A. C. 78.

Apropos of the observation made by the House of Lords of "proceeding too hastily," the arbitrators would do well to remember that many awards have been set aside on account of proceedings have been closed too hastily. Instances will be found in *Tryer* v. *Shaw*, (1858) 27 L. J. Ex. 320 ; *Haigh* v. *Haigh*, (1861) 31 L. J. Ch. 420. It is also incumbent upon the arbitrator to make it clear to the parties that he is closing the proceedings : *In re Maunder*, (1883) 49 L. T. 535 ; *Peterson* v. *Ayre*, (1854) 14 C. B. 665.

Cases of proceedings closed too hastily.

Whatever the latitude permitted to them as already set out, the first principles of justice must be applied by the arbitrators, be the arbitration commercial or of any other kind. Though intending no injustice they must observe the fundamental rules which govern judicial proceedings : *In re Gregson and Armstrong*, (1894) 70 L. T. 106 ; *In re Camillo Eitzen and Jewson & Sons.*, (1896) 40 Sol. J. 438.

Whatever latitude arbitrators may have, fundamental rules governing judicial proceedings must be observed by them.

The idea that the arbitrator, untrammelled by rules of procedure, evidence and fundamental principles of law and justice, can settle disputes in a manner which appears to him to be fair is an erroneous idea as has already been stated. A recent example of the arbitrator behaving in this way will be found in *Omanhene* v. *Chief Obeng*, A. I. R. 1934 P. C. 185, where the arbitrator laid down a new boundary line based on consideration of what would be a fair division of the disputed land. The award in that case was set aside.

That arbitrator can settle disputes untrammelled by rules of evidence, procedure and fundamental principles of law and justice altogether wrong.

What are Fundamental Rules

It is not intended to make an exhaustive catalogue of them as some of these rules have

What are fundamental rules referred to.

already come up for discussion incidentally in dealing with matters, like fixing reasonable time and place of hearing, issuing reasonably sufficient notices in connection with the same : (See *In re Enoch and Zaretsky, Bock & Co.*, (1910) 1 K. B. 327, previously referred to.)

Duty to Act Fairly and Impartially

Duty to act fairly and impartially obvious by reason of arbitrator's judicial position.

This is obvious from the arbitrator's judicial position, and from this follows the consequence that while parties cannot get out of an award by mere reason of error of judgment of the arbitrators yet this is subject to the condition precedent that the determination by them has been properly and fairly made and that they have followed the ordinary rules laid down for administration of justice : *Haigh* v. *Haigh*, (1861) 5 L. T., 507. For example, an umpire, called upon to decide on the condition of rape-seed, inspected samples shown to him by one party in the absence of the other. The award was set aside on the ground that the umpire's conduct in receiving one-sided evidence was a violation of the principles of justice: *In re Brook and Delcomyn*, (1864) 16 C. B. (N. S.) 403.

Consultation with Parties and Receiving Information from a Party without Knowledge of Others

Consultation with parties and receiving information from party without knowledge of others.

It is unnecessary to refer to the numerous authorities which will be found in support of the proposition that such a thing is not permissible, but attention is drawn to a case where solicitors had no improper motive in giving some information to the arbitrators : *Inland Revenue Commissioners* v. *Hunter*, (1914) 3 K. B. 423 at p.

428, where it was said : "I think it right to say that the well-known rule, that no communication shall be made by one party to a judicial tribunal without the knowledge of the other, is of the greatest importance". In the Calcutta case of *Kali* v. *Rajani,* 25 Cal. 141, the following observation of Maclean, C. J. : "In cases of arbitration when a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all concerned in relation to the selection and appointment of arbitrator" is to the same effect.

Where the arbitrator received papers from the defendant which were not shown to the plaintiff, the award was set aside : *Cursetjee* v. *Crowder,* 18 Bom. 299. Again, where after the close of evidence the arbitrator held a meeting at which one of the parties was absent, the award was not upheld : *In re Gregson and Armstrong,* (1894) 70 L. T. 106. But having regard to this decision, the correctness of the contrary view in *Crossley* v. *Clay* (1848) 5 C. B. 581, is very doubtful. Interviews between the arbitrator and one party, in the absence of the other, may also render the award liable to be set aside : *Harvey* v. *Shelton,* (1844) 7 Beav. 455 : see also *Daya Kishen* v. *Dharamdas,* 4 A. L. J. 159.

Where mistake in accounts was pointed out by one party in the absence of the other, the award could not stand : *Hodgson* v. *Brown,* (1856) 27 L. T. O. S. 175, and the same result, as is to be expected, followed where the arbitrators accepted documents which were not known to the other party : *In re Camillo Eitzen and Jewson and Sons,* (1896) 40 Sol. J. 438, and

when the arbitrator held confidential enquiries behind the back of parties: *Sanyasi Rao* v. *Venkata Rao*, 47 Mad. 30.

Necessity of Proceeding in Presence of both Parties

Necessity of proceeding in presence of both parties to be followed rigidly by arbitrators.

Arbitrators should rigidly follow this rule because departure from it has often been considered to be a substantial ground for setting aside of the award.

A decision arrived at in violation of this rule is not void. For instance where two witnesses were examined behind the back of a party who was excluded from the room and given no opportunity of cross-examining him, it was held that the award would be good till it was set aside: *Bache* v. *Billingham*, (1894) 1 Q. B. 107.

It is quite clear, however, that if an application had been made for setting aside the award, the same would have been allowed as Lopes, L. J., said at p. 112 of the abovementioned case :—"If this were an ordinary arbitration, I take it that it would be a good ground for applying to the Court to set it aside on the ground of the misconduct of the arbitrators."

In re Plews and Middleton, (1845) 6 Q. B. 845, each of the arbitrators examined the same person separately for ascertaining the amount of interest due from him, came to the same conclusion and made their award. In setting aside the award it was said by Coleridge, J. :—"To uphold this award would be to authorise a proceeding contrary to the first principles of justice. The arbitrators here carried on

examinations apart from each other, and from the parties to the reference ; whereas it ought to have been conducted by the arbitrators and umpire jointly in the presence of the parties".

How strongly the Courts condemn the practice of examining witnesses or hearing references in the absence of one of the parties is illustrated in *Ramsden & Co.* v. *Jacobs*, (1922) 1 K. B. 640. In that case the arbitrator heard the evidence of each of the parties in the absence of the other. No objection was made by the parties at the time to the procedure and it was not shown that any injustice had resulted from this improper procedure, and yet in setting aside the award Bray, J., stated :—"It is said on behalf of the sellers that no injustice was done, that the issues were quite plain and depended upon no question of fact on which there would be a conflict of evidence. I feel the force of that, but Mr. Goddard for the buyer has urged that we ought to show our disapproval of the procedure that was followed, and, with some reluctance I yield to that argument and say that we ought to set the award aside" (at pp. 641, 642).

Swearing of affidavit to contrary will not affect situation.

It seems to be immaterial if the arbitrators swear an affidavit stating that the evidence which was taken behind the back of one of the parties did not influence their decision one way or the other, because the Court in a similar instance was of opinion "that no Court could permit an arbitrator to decide so delicate a business, as whether a witness, so examined without the knowledge of one of the parties had

an influence on him, or not" : *Fetherstone* v. *Cooper*, (1803) 9 Ves. 68.

Arbitrator's asseveration otherwise will not even do.

Similarly where the arbitrator explained that all that had happened, when he was closeted with a witness and a pleader, was that the witness merely explained the plans and the pleader was present to give him information in connection with the case, but his opinion was not biased by any of those facts. The Court held that there was an opportunity for the mind of the arbitrator being biased and set aside the award : *Dobson* v. *Groves*, (1844) 14 L. J. Q. B. 17.

In a Calcutta case where the first meeting of the arbitrators was held behind the back of one of the parties and it was urged that nothing was done at the meeting, it was said by Maclean, C.J.: "It is all very well to say nothing was done at that meeting, but how do we know what may or may not have been said by the Plaintiffs ? They may, for aught we know, have made *ex parte* statements to the arbitrators about the case, they may have instilled some poison into the arbitrators' minds to the prejudice of the Defendants" : *Toolsimony Dassee* v. *Sudevi Dassee*, 3 C. W. N. 361, at p. 363.

Whatever the practice may be in commercial arbitrations, when such matters are brought before the Courts, they have refused often to recognise that witnesses may be examined in the absence of one of the parties, or that information may be received by the arbitrators in the absence of a party. Lord Langdale, M. R., in *Harvey* v. *Shelton*, (1844) 7 Beav. 455, has said that first principles of justice cannot be departed from

because an arbitration is a commercial one. No custom or usage or practice can justify hearing evidence *ex parte* : *In re Delcomyn and Badart*, (1864) 16 C. B. N. S. 403. Those who feel interested in more reported cases may refer to—*In re Hick*, (1819) 8 Taunt. 694 ; *Royal Commission on Sugar Supply* v. *Trading Society Kwik-Hoo-Tong*, (1922) 38 T. L. R. 684 ; *Drew* v. *Drew*, (1855) 2 Macq. 1 ; *In re Tidswell*, (1863) 33 Beav. 213 ; *In re O' Connor and Whitlaw*, (1919) 18 L. J. K. B. 1242 (C. A.) ; *Ganga Sahai* v. *Lekhraj*, 9 All. 253. A very large number of authorities on the point will also be found referred to in the judgment of Mookerjee, J. in *Ganes Narayan* v. *Malida Koer*, 13 C. L. J. 399.

In spite of the decision of *Ramsden & Co.* v. *Jacobs*, (1922) 1 K. B., 640, a party, who intends to object to the arbitrator examining the witness behind his back, when he comes to know that this has been done, should either withdraw from the reference, or move the Court for the removal of the arbitrators, as otherwise his subsequent attendance may amount to waiver of the impropriety of conduct of the part of the arbitrators : *Drew* v. *Drew*, (1855) 2 Macq. 1. It was in this case that Lord Chancellor Cranworth said that if the arbitrator has examined a witness behind the back of the parties and afterwards tells the parties : 'I have examined so and so behind your back ; do you wish that I should re-examine them ?' and they say, 'No, we do not ; we desire you to proceed nevertheless' ; then that is an error that may be waived. It is not enough that he should tell them, 'I have examined *A* and *B* behind your back, now come

Numerous authorities on point to be found in 13 C. L. J. 397, (1922) 1 K. B. 640 differed in (1855) 2 Macq. 1.

and let me examine them in your presence'. I think, in that case, the party might very fairly say, 'You have examined them behind my back, therefore I beg leave to say that I shall double up my papers and walk away' (at p. 9).

In spite of those very emphatic statements in *Mercer* v. *Reid*, (1931) 48 T. L. R. 33, where the arbitrator had seen a witness behind the back of the parties, and as the result thereof, had varied his award in favour of the complaining party, the Court held that the act of the arbitrator did not amount to misconduct. If the Court had refused to set aside the award on the principle that a party could not complain in whose favour an error had been made, the judgment could have been supported on that ground, but the judgment did not in fact proceed on the application of that principle.

The discussion of acts amounting to waiver or irregularity will be further discussed at a later stage.

Arbitrator calling Witness against Wishes of Parties

Arbitrator calling witness against wishes of parties. Russell approves *dictum* of Moulton, L. J. in (1910) 1 K. B. 333.

In *Russell on Arbitration and Award*, 13th Ed., p. 358, the learned author quotes with approval the statement on the point of Moulton, L. J., *In re Enoch and Zaretzky, Bock & Co.*, (1910) 1 K. B. 327 at p. 333, namely :—"It is certainly not the law, that a judge or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties." The learned Judge, after quoting the statement of

Esher, M. R, in *Coulson* v. *Disborough*, (1894) 2 Q. B. 316, namely ;—"If there be a person whom neither party to an action chooses to call as a witness, and the Judge thinks that that person is able to elucidate the truth, the Judge, in my opinion, is himself entitled to call him," proceeds to state that "If that means to call him whom either side objects, I am satisfied that there is no basis for that dictum."

Moulton's *dictum* inapplicable to India by reason of O. 16 r. 14. C. P. C. 1908.

In India by reason of O. 16 r. 14 of the Civil Procedure Code, 1908, the Court has power to call a witness not called by either party, if it thinks necessary, and there is no requirement in the rule for getting the consent of the parties, and it is submitted that the statement of law in *Russell on Arbitration and Award*, just referred to based on the dictum in (1910) 1 K. B. 333 quoted above, is not applicable to India, as here the arbitrator has the right to examine a witness, even if objected to by the parties.

Witnesses have actually been examined by Indian Courts despite objection of parties.

In India, both in the High Courts and Courts below, witnesses have been called by the Court, whom neither party desires to put into the witness-box. In such cases it is not usual for any of the parties to object to this course, but instances have been known in my own experience of the Original Side of the Calcutta High Court of witnesses having been examined by the Court, in spite of the objection from the parties.

Arbitrator Consulting Lawyers

Arbitrator consulting lawyers expounded in 58 I. A. 381 and 29 Cal. 854.

The consequences of an arbitrator or umpire consulting lawyers have often been considered by the Court, but at the outset reference may be made to a decision of the Judicial Committee in

Louis Dreyfus & Co. v. *Arunachala Ayya*, 58 I. A., 381. In that case the umpire commenced his award by stating "having taken independent legal opinion". But in dealing with the contention that the umpire had been guilty of misconduct Lord Tomlin stated: "The precise length to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms. It is less difficult in a particular case to determine whether or not an arbitrator has gone further than is justifiable. Here unless the language of the award is itself sufficient to fix the umpire with misconduct, the charge against him must fail".

"In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case against the umpire in this respect is not, in their Lordships' view, strengthened because the umpire in the exercise of his discretion refused to state a special case" (at p. 391). In another case which also went up to the Judicial Committee, *Buta* v. *Municipal Committee of Lahore*, 29 Cal. 854, the agreement of reference to arbitration had been drawn up by the defendant's Counsel, and the arbitrator, without the knowledge of the other party, obtained the opinion of that Counsel on the scope of the agreement. This was contended to be a misconduct on the arbitrator's part inasmuch as it was said :—"Upon this point their Lordships consider it sufficient to repeat what

was said by Lord Selborne in delivering the judgment of this Committee in *Rolland* v. *Cassidy*, (1888) L. R. 13 A. C. 770 :—"It would be prudent and discreet for arbitrators, when they desire to put themselves on the best possible footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentleman whom they may see upon that subject. But, if they cannot be shewn to have acted with improper partiality or for any other purpose than that of being correctly informed about the law, and avoiding mistakes of law, and if they cannot be shewn to have been misled as to the law, it seems an extraordinary thing.....if they having been rightly advised as to the law, and having taken all the steps which they did take for the sole purpose of getting correct information as to the law, that should be a ground for setting aside the award" (at pp. 776, 777).

It will be seen that in following the course adopted by the arbitrators in the above case, they or the parties supporting the award run the risk of being called upon to show (1) that the sole desire was to get information on questions of law ; (2) that the opinion given was correct ; and (3) that the opinion was obtained on a complete statement of all relevant facts of the case. Indian authorities, like *Nanjappa* v. *Nanjappa*, 23 M. L. J. 290, do not throw any additional light on the matter under discussion.

23 M. L. J. 290 not fully enunciative.

It seems there is a difference between information received from a lawyer on the question of law and that obtained from a man of science —which was the point discussed in *Dobson* v.

Difference between information received

from lawyer and that received from man of science expounded in (1844) L. J. Q. B. 17.

Groves, (1844) 14 L. J. Q. B. 17, where Lord Denman, C. J., said—"It seems to me no information of that sort ought to be given in the absence of parties, unless there is a specific power for that purpose reserved, or unless both parties agree that the arbitrator should so inform his mind. It is quite a different thing from a learned person consulting a legal friend on a piece of legal information" (at p. 21).

Arbitrator employing his personal knowledge expounded in A I.R. 1935 Mad. 152.

Somewhat analogous to the receipt of information from lawyers and others is the use of the arbitrator's personal knowledge. The law applicable to this situation has been correctly expounded in *Chidambaram* v. *Ayyappa*, A.I.R. 1935 Mad. 152, namely :—If arbitrators use knowledge from any source except from the evidence before them and fail to communicate such knowledge to the parties, and, if a party is thereby prejudiced, the award is liable to be set aside. But where the arbitrator has been selected because of his personal knowledge of the matter in dispute, it would not be misconduct if he uses his personal knowledge in coming to a decision, though it is desirable that he should inform the parties what his personal knowledge is and give an opportunity to them to adduce evidence for modifying his views. Moreover, where such information has not been given to the parties by the arbitrator, if such error on the part of the arbitrator has not in fact prejudiced the parties, the award will not be interfered with.

This is not in conformity with the *dictum* in *In re Brien and Brien*, (1910) 2 Ir. R. 84, to the effect :—"It is not enough to show that, even

if there was misconduct on the part of the arbitrators, the award was unaffected by it, and was in reality just."

It is submitted that the best exposition of the law on the point is to be found in the above-mentioned Madras case.

Necessity of Joint Presence at Hearings and Powers of Delegation

The general rule is that an arbitrator has no power to delegate to another, not even to a co-arbitrator, the duties which he has been appointed for discharging.

Arbitrator cannot delegate powers to co-arbitrator, delegation permissible in case of ministerial acts.

Delegation is permissible only in the case of ministerial acts : *Matilal Ghose* v. *Giris Chandra Ghose*, 12 C. L. J. 346. What is *ministerial* act as opposed to *judicial* act is not always easy to ascertain, as has been stated in *Stevenson* v. *Watson*, (1879) 4 C. P. D. 148, but some guidance may be had from reported decisions.

What are ministerial acts discussed.

The mere receipt of a written statement from a party was held to be a ministerial act in *Manindra* v. *Mahananda*, 15 C. L. J. 360, and in *Buta* v. *The Municipal Committee of Lahore*, 29 Cal. 854 P. C., cited above in connection with the arbitrators' taking legal advice, the delegation of the checking of measurements to an engineer, the son of the arbitrator, was held to be permissible. Similarly, the measurements of fields or areas of pieces of water have been held to be ministerial acts : *Throp* v. *Cole*, (1835) 2 C. M. & R. 367. Again, if an arbitrator, in an arbitration held under the Arbitration Act, 1899, awards such costs as shall be taxed by the Taxing

Office of the Calcutta High Court, such delegation will be good on the strength of authorities, like *Holdsworth* v. *Wilson*, (1863) 4 B. & S. 1, which considers such taxation of costs to be a ministerial act, though some difficulty may be felt in appreciating such contention.

Partial delegation of authority makes award bad if defective part is inseparable.

It is clear, however, that if the arbitrator directs a party to execute a proper conveyance or release in favour of another and reserves the power to appoint a lawyer for settling a proper document, such delegation would be improper, and in such circumstances an award is liable to be set aside : *Tandy* v. *Tandy*, (1841) 9 Dowl. 1044. A partial delegation of authority will make the award bad, if the defective part cannot be separated from the rest : *Johnson* v. *Latham*, (1850) 19 L. J. Q. B. 329.

Whether delegation has been excessive depends upon individual case.

As has been indicated already, in actual application the question, whether the amount of delegation has been excessive in the particular circumstances of a case, is not always easy to answer, even in matters not strictly judicial. For instance, an arbitrator may have assistance from an accountant in examining accounts : *Anderson* v. *Wallace*, (1835) 3 C. & F. 26 ; but where an arbitrator sent two sets of statements and counter-statements relating to accounts from the two parties to an accountant, and basing on the latter's report made his award without further communication with the parties, it was held that the extent of delegation had been too great and in the absence of parties and the award was thus set aside : *Eastern Counties Rail Co.* v. *Eastern Union Rail Co.*, (1863) 3 DeG. J. & S. 610. Similarly, where the arbitrator was

Arbitrator consulting expert opinion and receiving it in evidence, award thereon set aside.

authorised to define water depths and to order erections to be put up, and he, after declaring that the defendant was entitled to maintain his weir at the depth of 14 inches and no more, ordered that the marks should be put up about the weir as B, to whom such authority was delegated, might direct, it was held that the delegation was improper: *Johnson* v. *Latham* (1850) 19 L. J. Q. B., 329.

But not when arbitrators receive expert opinion after deliberation.

If the arbitrators agree to be bound by the opinion of an expert or experts whom they consult, then the award would be liable to be set aside, but not, if they received that opinion as a piece of evidence and adopted it after exercising their own judgment: *Hopcraft* v. *Hickman*, (1824) 2 S. & S. 130.

Mookerjee, J., in *Juggobondhu* v. *Chand Mohan*, 22 C. L. J. 239, has enunciated the law on the subject quite lucidly in these words:—

Mookerjee, J's learned discussions on point in 22 C. L. J. 239.

"It cannot be disputed that an arbitrator has no authority to delegate his functions, except possibly the performance of what are called 'ministerial acts;' *Lingood* v. *Eadé*, (1742) 2 Atk. 501 (504); *Emery* v. *Wase*, (1801) 5 Ves. 846 (848); *Little* v. *Newton*, (1841) 9 Dowl. 437; Tandy v. Tandy, (1841) 9 Dowl. 1044; *Whitmore* v. *Smith*, (1861) 7 H. & N. 509; *Eads* v. *Williams*, (1854) 4 DeG. M. & G. 674.' 'The Subordinate Judge states in his judgment that the arbitrator was authorised to take assistance in technical matters; that, indeed, was permissible to him, in so far as assistance was necessary for the discharge of his duties: *Caledonian Railway Co.* v. *Lockhart*, (1860) 3 Macq. 808; *Emery* v. *Wase*, (1801) 5 Ves. 846; *Hopcraft* v.

Hickman, (1824), 2 S. & S. 130 ; *Anderson* v. *Wallace*, (1835) 3 C. & F. 26. But this would not entitle him to delegate his powers practically to another person. The decision must ultimately be his own judgment in the matter, although in the process of formation of that conclusion he may take the assistance of experts : *Nanjappa* v. *Nanjappa*, (1912) 23 M. L. J. 290."

Consent of parties or express authority may give authority for delegation.

It is scarcely necessary to add that the consent of parties or express authority in the arbitration agreement may authorise an arbitrator to delegate in a way or to an extent which would otherwise not be permissible.

Disability of delegation establishes principle of acting together.

From the legal inability of delegation by the arbitrators of their functions follows the principle that the arbitrators must act together.

Delegation of each other's special duties by arbitrator improper.

The doctrine relating to inability of the arbitrators to delegate their duties, as will be noticed from the authorities already referred to, has been considered from various aspects. All the arbitrators may have delegated a duty to a stranger, which is not a purely ministerial act, or the delegation may be by the same arbitrators to their colleagues.

If the arbitrators consist of two merchants and a lawyer and a point of law arising is left by the merchants to the judgment of the lawyer, such delegation would be improper. In such a situation it was said by Tindal, C. J., in *Little* v. *Newton*, (1841) 9 Dowl. 437—"But there is no principle of law which will authorise such a delegation of their opinion, and it is impossible to say, but that if the legal arbitrator had expressed his opinion to the others before the award

was signed, some arguments might have been raised which would have produced a different result" (at p. 444). If, as the result of independent discussions *inter se.*, an arbitrator, who had come to his decision, yields to the opinion of his colleagues, that is quite permissible as will be seen from *Eardley* v. *Steer*, (1835) 4 Dowl. 423, where an arbitrator reduced the amount to be awarded by accepting the view of his co-arbitrator. If such a thing were not permissible, there would be no object in the arbitrators having discussions among themselves.

General principle of disability of delegation establishes that each arbitrator should be present at every meeting.

The general principle of inability to delegate and its application lead *inter alia* to the proposition that each of them should be present at every meeting : *Lord* v. *Lord*, (1855) 26 L. J. Q. B. 34 ; *Plews* v. *Middleton*, (1845) 6 Q. B. 845 ; *Benodi Lal* v. *Pranchandra*, 14 C. L. J. 113 ; *Paroshattamdas* v. *Kekhushru*, 35 Bom. L. R. 1101 ; *Thammiraju* v. *Bapiraju*, 13 Mad. 113. While this is so, it may well be that on the occasion when one of the arbitrators was absent, the others did not take up any matter for decision, but merely inspected accounts or did some work of a similar nature, and that every decision made was made by all the arbitrators. In such a case the award would be valid, and this is the conclusion to which the Court arrived in *Nadiar Chand Shaha Bonik* v. *Gobind Chander Shaha Bonik*, 2 C. L. J. 61, quite irrespective of the fact of the waiver of this irregularity which was also a bar to the setting aside of the award.

Where failure of arbitrator to act together occasioned

The failure of the arbitrators to act together may lead to the award being set aside, but the lapse may be of so formal or unsubstantial

remission of award and not its setting aside.

character as to induce the Court to remit the award instead of setting it aside: *Anning* v. *Hartley*, (1858) 27 L. J. Ex. 145; *Goodman* v. *Sayers*, (1820) 2 J. & W. 249. The matter of waiver of irregularity will come more conveniently in discussing the setting aside of awards and, therefore, for the present may be left out of further consideration.

Arbitrator's decisions not upset except for circumstances under which they can legally be set aside.

Scattered all over various reported decisions will be found statements that arbitrators are taken by parties for better or for worse, and that parties having chosen their own judge cannot object to his decision, either upon the law or facts and others of similar nature. All such observations must be taken subject to the various exceptions already pointed out, that is, error of law appearing on the face of the award or in a document incorporated with the award, improper delegation by arbitrators, their failure to follow the fundamental principles of justice or their even honestly exceeding the jurisdiction vested in them. Indeed, in every case in which an award is set aside, we get an instance of the limitation of the power of arbitrators in the matter of conducting the reference and making the award, though undoubtedly taken for better or for worse by the parties.

LECTURE VI

SIGNING AND FILING OF AND JUDGMENT ON AWARD

Signing and Filing the Award

This matter is now dealt with by sec. 14 of the Arbitration Act, 1940, and was formerly governed by sec. 11 of the Indian Arbitration Act, 1899, which has now been modified in several directions, and by para. 10 of the Second Schedule of the Civil Procedure Code, 1908.

Signing and filing of award dealt with in sec. 14Arbitration Act 1940.

The scheme of sec. 14 of the Arbitration Act, 1940, is that when an award has been made by arbitrators or umpire, they shall sign it and give notice of that fact to the parties, as also of the amount of fees and charges payable in respect of the arbitration and award. If requested by a party or one claiming through him, or if so directed by the Court, they shall cause the award or a signed copy of it together with any depositions and documents which may have been taken or proved before them to be filed in Court. But before doing this they have the right to be paid the fees and charges due in respect of the arbitration and award as well as costs and charges for filing the award.

Details of scheme of sec. 14.

If the arbitrators or umpire choose to state a special case under sec. 13(*b*), the Court, after notifying the parties and hearing them, shall pronounce its opinion, which shall be added to and form part of the award.

In special case under sec. 13(*b*) Court's opinion to form part of award.

It must have been noticed that the filing of the award is at the instance of the arbitrator :

Filing of award to be notified by arbitrator to parties.

Baijnath v. *Ahmed*, 40 Cal. 219. The corresponding sec. of the Indian Arbitration Act, 1899, that is, sec. 11(*2*) provided that notice of the filing of the award shall be given to the parties by the arbitrators or umpire. The section did not say "notice in writing," nor did it require the Court to give notice of the filing to the parties.

Para. 10 C.P. C. requires arbitrator to sign and file award in Court with documents.

Under the Second Schedule of the Civil Procedure Code, 1908, by reason of para. 10, all that was required was that the persons making the award "shall sign it, and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them." There is also provision under this paragraph of giving notice of the filing to the parties.

Omission of notice of filing makes award not unenforceable.

In spite of the language of sec. 11(*2*) of the Indian Arbitration Act, 1899, it was ruled in *Udaichand* v. *Debibux* : 47 Cal. 951, that the omission to give notice of the filing of the award did not make the award unenforceable, inasmuch as sec. 15 of the Act of 1899 provided that "an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall be enforceable as if it were a decree of the Court," unless the award is remitted. It is submitted that this decision is incorrect by reason of no effect having been given to the words "in accordance with the foregoing provisions".

Bombay decisions hold that arbitration made against scheme and leading to award not fit to be filed.

It appears that there are several unreported cases of the Bombay High Court holding that if an arbitration, not conducted in accordance with the scheme of the Act, leads to an award, the same cannot be filed in the Court. But after dealing with this fact, Mr. Paruck in his *Law*

of Arbitration in British India, at p. 83, adds :—"One decision was given by Kanga, J., in *Sukdeo Ramdas* v. *Dharamsey Jetha and Co.* on 11th March 1922 and was confirmed in appeal by Shah, Ag. C. J. ; another decision was recently given by Rangnekar, J., in *Fazullally Jiwaji Raja* v. *Khimji Poonja* on 30th August 1933 in Award No. 27 of 1933 ; in both these cases it was held that the award of the appeal committee could be filed under this section." For another case of appellate tribunal hearing appeals against arbitrators, see *Kellett* v. *Stockport Corporation*, (1906) 70 J. P. 154. In various trades, like cotton and jute, the scheme of arbitration permits appeal to appeal committees or other bodies. As stated above some unreported Bombay judgments have held that awards of these appeal committees cannot be filed as obviously not being in consonance with the scheme of the Indian Arbitration Act.

Contrary view taken in 31 C. W. N. 730 backed by English decisions.

Quite a contrary view has been laid down in *Heeralal Agarwalla & Co.* v. *Joakim Nahapiet & Co.*, 31 C. W. N. 730, according to which, though the Indian Arbitration Act does not provide for arbitration by a committee of appeal, the name is of no importance, and when from the substance of the contract, it is clear that parties contemplate a fresh set of arbitrators to be the final deciding authority, such a committee is to be regarded as a body of arbitrators or an umpire, and an award by it could be a valid award under the Act. This conclusion is amply supported by the authorities on which their Lordships have relied : *In re Keighley Maxsted & Co. and Durant & Co.*,

(1893) 1 Q. B. 405 and *Produce Brokers & Co., Ltd.* v. *Olympia Oil and Cake Co. Ltd.*, (1916) 1 A.C. 314. Thus in the case of *Keighley Maxsted and Co.*, the submission provided that any party dissatisfied with the award might appeal against it to the appeal committee of the London Corn Trade Association consisting of twenty-five members, who in each case elected five out of them to hear the appeal. This was held to be valid as the Court treated the appeal committee as a duly appointed umpire.

Sec. 14 provides for giving notice in writing to parties of making and signing of award.

Sec. 14 makes it obligatory "to give notice in writing to the parties of the making and signing" of the award. Is it necessary to send to the parties copies of the award with the notice or to give them the substance of the award? This question has been answered in the negative in England, where in O. 64 r. 14 the language used is "award has been made and published to the parties": See *Brooke* v. *Mitchell*, (1840) 9 L. J. (N. S.) Ex. 269; *Potter* v. *Newman*, (1835) 4 Dowl. 504.

English law provides six weeks, whereas Indian law lay down thirty days from notice for setting aside of award.

The English rule has been framed for the purposes of calculation of time, that is, six weeks from the publication of the award to the parties for applying to set aside the award. Under the Arbitration Act of 1940, the time for applying to have an award remitted or set aside is thirty days from the date of service of the notice of filing of the award. It is thus evident that the English decisions relating to publication are of no assistance in arbitrations governed by the Arbitration Act of 1940.

As regards the Court in which the award is to be filed, it must be the Court which has

jurisdiction to decide the dispute which was the subject-matter of the arbitration : *John Batt & Co.* v. *Kanoolal & Co.*, 53 Cal. 65 (and see the definition of Court in sec. 2 (*c*) of the Arbitration Act, 1940). By the definition of 'Court' in sec. (2), the Small Causes Court is excluded, unless the arbitration is in a suit pending before such Court.

Award to be filed in Court having jurisdiction over dispute.

Is the jurisdiction of the Court in connection with the filing of the award determined by the value of the claim in the arbitration proceedings or by the amount allowed by the award ? The former in the accepted view according to the decision of the Madras High Court in *Subrayya* v. *Manju Nath*, 29 Mad. 44.

Value of claim in arbitration determines jurisdiction of Court.

Before the Judicial Committee in *Ramlal* v. *Kishanchand*, 51 Cal. 361, the question was raised whether, if the award related to two properties *A* and *B* within the jurisdiction of two Courts, the award could be filed in a Court having jurisdiction over one of the properties only. Their Lordships did not think it necessary to decide this question, but they did hold that if the Court had no jurisdiction over the properties in dispute, there would be no jurisdiction for the award being filed there. This was a decision under sec. 525 of the Civil Procedure Code of 1882.

Court's jurisdiction when award related to two properties in different jurisdictions decided in 51 Cal. 361.

Sec. 14 of the Arbitration Act, 1940, has made it clear that no decree can be passed upon the award, until notice of the filing of the same has been served on the parties. The matter of judgment being passed in terms of the award and the effect of filing the award will be consi-

Sec. 14 makes clear that there would be no decree without notice of filing on parties.

dered in connection with sec. 17 of the Arbitration Act, 1940.

Power of Court to Modify Award

No modification of award under Act 1899, C. P. C. 1908 first gave such power, sec. 15 of 1940 Act only follows that.

Under the Indian Arbitration Act, 1899, there was no power given to the Court to modify or correct the award as was given by sub-cl. (*a*) of para. 12 of the Second Schedule to the Civil Procedure Code, 1908. Sec. 15 of the Arbitration Act, 1940, dealing with the power of the Court to modify the award has been reproduced without changes from para. 12 of the Second Schedule of the Civil Procedure Code of 1908. Sec. 15 (*a*) refers to a case where 'a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred'. But before the Court's power of modification of the award can be attracted, it must be clear that the part of the award sought to be enforced stands on a distinct and independent footing from the part of the award which is illegal : *Amir Begam* v. *Badruddin*, 36 All. 336 ; *Buta* v. *Municipal Committee of Lahore*, 29 Cal. 854 ; *Juggobondhu* v. *Chand Mohan*, 22 C. L. J. 237 ; *Bhim Sen* v. *Tara Chand*, A. I. R. (1932) A. 154. For the grounds on which the award can be modified under sec. 15 (*a*) of the Arbitration Act, 1940, guidance is obtained from the decisions under the corresponding provision, namely, para. 12, Second Schedule, Civil Procedure Code, 1908. It has been held that the grounds set out in the provision are quite exhaustive and the Court cannot modify an award under the provisions of sec. 151 of the C. P. Code relating to its inherent powers : *Kaikabad* v.

Khambatta, 11 Lah. 342 ; *Aftab Begum* v. *Haji Abdul*, 22 A. L. J. 816.

Court having no modification power under sec. 15 (*a*) can remit award.

But where the Court has no power of modification under sec. 15(*a*), it can, of course, remit the award to the arbitrator or umpire for reconsideration : *Anant Ram* v. *Gurditta Mal*, 7 Lah. 327.

Sec. 15(*b*) covers imperfect or erroneous award, while sec. 15 (*c*) covers clerical mistake or accidental omission.

Sub-sec. (*b*) of sec. 15 refers to a case "where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision" i.e. decision on the matter referred, while sub-sec. (*c*) relates to correction of "a clerical mistake or an error arising from an accidental slip or omission".

Sec. 15 being reproduction of para 12 C. P. C. 1908 was directed to awards made through Courts only.

Decisions under para. 12 of the Second Schedule of the Civil Procedure Code, 1908, (which paragraph is now reproduced in sec. 15 of the Act) have held that only in case of awards made through the Court that it has the power of modification or correction, but such power does not extend to other awards which have sometimes been called "private awards" : *Mustafa Khan* v. *Phulja Bibi*, 27 All. 526 ; *Algappa* v. *Chidambaram*, A. I. R. (1931) M. 619 ; *Riaz-ud-din* v. *Shuja-ud-din*, A. I. R. (1925) L. 86.

Powers of modification and correction of awards extend to all awards.

Sec. 15 of the Act of 1940 appears in the Chapter "Arbitration without intervention of a Court", but is made applicable to arbitration in suits by reason of sec. 25 and to "arbitration with intervention of a Court where there is no suit pending" by operations of sec. 21. Consequently the powers of modification and correction of awards given by the sub-sec. of sec. 15 extend to all awards.

Power to Remit Award

Comparison and contrast of provisions for remission in English Act, 1899, Indian Act 1899, C. P. C. 1908 and Indian Act 1940.

In order to appreciate the *ratio* of decision in reported cases bearing on the question of remission of the award, it is necessary to notice and compare the language of the English Arbitration Act, 1889, the Indian Arbitration Act, 1899, the Civil Procedure Code, 1908, Second Schedule, and the Indian Arbitration Act, 1940.

For convenience of reference, the relevant provisions are stated in a tabular form on the next page.

Though language general in 1899 Act yet Calcutta High Court held specific grounds must exist for remission.

In the Indian Arbitration Act, 1899, the language is quite general and no indication is given of the grounds on which an award may be remitted to the reconsideration of the arbitrators or umpire. Nevertheless, the Calcutta High Court, following the English decisions, held that there were only certain specific grounds justifying a remission of the award.

41 Cal. 313 is case on point.

In *Crompton & Co. Ld.* v. *Mohan Lal*, 41 Cal. 313, the award was attacked on the ground of the legal misconduct of the arbitrator. The award was set aside and the question arose whether the Court could in such circumstances remit the award. The Counsel in that case contended that in cases of misconduct the award would be set aside, but the Court would have no power to remit the award. In dealing with that contention, Chaudhuri, J., observed as follows :— "His (Counsel's) argument is that there is no provision, in the section for remitting the award, in the case of misconduct but that power is given merely to set aside the award, and that section 13 dealt with cases other than that of misconduct. Section 13 of the Arbitration Act

ENGLISH ARBITRATION ACT, 1889	INDIAN ARBITRATION ACT, 1899	C. P. CODE, 1908, SECOND SCHEDULE	INDIAN ARBITRATION ACT, 1940
Sec. 10. (*1*) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire. (*2*) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.	Sec. 13. (*1*) The Court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire. (*2*) Where an award is remitted under sub-sec. (*1*), the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting the award.	Para. 14. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,— (*a*) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred ; (*b*) Where the award is so indefinite as to be incapable of execution ; (*c*) Where an objection to the legality of the award is apparent on the face of it. Para. 15. (*1*) An award remitted under para. 14 becomes void on the failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely :—etc.	Sec. 16. The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit— (*a*), (*b*), (*c*) Same as (*a*) (*b*) (*c*) in the preceding column. (*2*) Where an award is remitted under sub-sec. (*1*) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court : Provided that any time so fixed may be extended by subsequent order of the Court. (*3*) An award remitted under sub-section (*1*) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

corresponds with section 10 of the English Arbitration Act of 1889, and section 14 corresponds with section 11, sub-clause 2. Section 10 of the English Act of 1899 is the same as section 8 of the Common Law Procedure Act of 1854: under section 8 an award could be remitted upon certain specified grounds. The same rule as laid down in section 8 has been held to apply to section 10 of the English Act of 1889. This was so stated by Lord Esher, M. R. in *In re Keighley Maxsted & Co. and Bryan Durant & Co.*, (1893) 1 Q. B. 405. In *In re Arbitration between Montgomery Jones & Co. and Liebenthal & Co.*, (1898) 78 L. T. 406, Smith, L. J. and Chitty, L. J. held the same. They said that they agreed that with regard to section 10 of the English Arbitration Act of 1889 there were four grounds upon which the matter could be remitted to an arbitrator for consideration. Those grounds are—(1) where the award is bad on the face of it, (2) where there has been misconduct on the part of the arbitrators, (3) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, (4) where additional evidence has been discovered after the making of the award. Chitty, L. J., however, thought that it was not necessary to limit the operation of section 10 to those four grounds" (at pp. 320, 321).

In the above case there was no question of moral misconduct and there was no allegation that the arbitrator was corrupt or partial in any way, and the Court was pleased to remit the matter to the same arbitrator.

Later in *U. M. Chowdhury & Co.* v. *Jiban*

Krishna Ghose & Son, 49 Cal. 646, the Court, after a review of a large number of English decisions, reaffirmed the proposition that "the grounds upon which the Court will remit the matter for reconsideration are—

49 Cal. 646 only affirms above view.

(*i*) that the award is bad on the face of it, (*ii*) that there has been misconduct on the part of the arbitrator, (*iii*) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted, (*iv*) when additional evidence has been discovered after the making of the award."

The generality of the language used in sec. 13 of the Indian Arbitration Act, 1899, was thus reduced as regards its operation by those two decisions. It is submitted that the correct situation arising from those decisions is as follows :—

Generality of language in sec. 13 neutralized by those decisions.

(*1*) Before the Act of 1940 in arbitrations governed by the Civil Procedure Code, a remission could be made on three grounds only, namely, those stated in sub-clauses (*a*), (*b*) and (*c*) of para. 14 of the Second Schedule. The present Act is an exact reproduction of the provision in the Civil Procedure Code and so remission should be limited to the said three grounds.

Summary of situation arising out of those decisions on point.

(*2*) Before the Act of 1940, while the language of the Indian Arbitration Act, 1899, left the grounds for remission undefined and unstated, only on certain specific grounds the award could be remitted, as will appear from the cases already cited.

Under the Act of 1940, as only three grounds are mentioned, an award, it is further submitted, cannot be remitted on the ground of the arbitrators' mistake or discovery of fresh evidence.

Where illegality appears in reasons given out by arbitrator, remission justified.

While that is the correct position, the arbitrator's action may be such as would lead to an illegality on the face of the award, thus attracting sub-cl. (*c*) of sec. 16 of the Arbitration Act, 1940. The illegality may appear from the reasons for his decision given out by the arbitrator in his award. In such a case remission will be justified on account of the award being illegal on the face of it.

Misconduct coming within clauses (*a*) (*b*) or (*c*) of sec. 16 affords Court power to remit award.

Similarly though 'misconduct' of the arbitrators is not mentioned as a ground for remission of the award, yet if the arbitrator leaves any matter undetermined, the award may be remitted to him under sub-clause (*a*). 'Misconduct', in the judicial sense of the term, includes honest, though erroneous breach of duty, and if such 'misconduct' comes within any of the clauses (*a*), (*b*) or (*c*) of sec. 16 of the Arbitration Act, 1940, the Court will have the power to remit the award.

What kind of judicial misconduct is covered by sub-sec. (*a*) sec. 16.

The fact that the word 'misconduct' has not been used in the section is immaterial, but only two kinds of judicial misconduct are covered by sub-sec. (*a*), namely, leaving undetermined a matter referred to arbitration and determining any matter not referred, where such matter cannot be separated without affecting the determination of the matters referred.

Misconduct judicial or otherwise not covered

It is submitted that 'misconduct', judicial or otherwise, which does not come within the description given of it in the three sub-secs.

of sec. 15, cannot attract the power of remission given to the Court by this section. To illustrate what is meant thereby a concrete case may be taken. An arbitrator with whom a letter-book was left read letters other than those put in evidence and had his decision materially influenced thereby. The award was remitted : *Davenport* v. *Vickery*, (1861) 9 W. R., 701, although the judicial misconduct of the arbitrator did not appear on the face of the award. In similar circumstances the same result would have followed in India by reason of decisions like those already cited, if it were a case to which the Indian Arbitration Act, 1899, applied, because one of the grounds for remitting the award was misconduct on the part of the arbitrators : *U. M. Chowdhury* v. *Jiban Krishna Ghose*, 49 Cal. 646. If this case was one to which the Civil Procedure Code, 1908, Second Schedule, applied, then the misconduct of the arbitrators in being influenced by documents not put in evidence not appearing on the face of the award, none of the sub-cls. (*a*), (*b*) or (*c*) would be available and the Court would have been left with no power to remit the award.

by sub-sec. in sec. 15 no ground for remission.

Result otherwise if case governed by C. P. C. 1908.

Under the scheme of the Arbitration Act, 1940, the provisions of sec. 15 would be applicable to arbitrations, where formerly they would be governed by the Indian Arbitration Act, 1899, or the Second Schedule of the Civil Procedure Code, 1908, and the net result is that the wider powers of remission exercised by the Courts under the Act of 1899 are now reduced to the limit offered by the provisions of the Code.

Court's power to remit award by previous Acts reduced by recent Acts.

Indian Courts not to follow English decisions blindly.

Speaking generally the Indian Courts would not be permitted to follow the English decisions blindly, inasmuch as the English statutes, as construed by the Courts, give wider powers of remission as compared with the three specific grounds mentioned in sec. 16 of the Arbitration Act, 1940. In this view of the matter in each case the question will be not what would have been the decision in England, or under the Indian Arbitration Act, 1899, but whether the ground urged for remission of the award is or is not covered by the three specific grounds stated in sub-cls. (*a*), (*b*) and (*c*) of sec. 16 of the Arbitration Act, 1940. In fact from *Davenport* v. *Vickery* cited above, it has been seen how in a case improper conduct on the arbitrator's part did not induce the Court to set aside the award which was remitted.

Instances where award remitted for implied misconduct of arbitrator.

Again, when an arbitrator, who had failed to give directions as to costs, but subsequently wrote a letter curing this omission, the award was remitted as the Court declared that it ought not to accept the bare statement of an arbitrator as to what was his real intention : *Harland* v. *Newcastle Corporation*, (1869) L. R. 5 Q. B. 47. This will come under sec. 16(*a*) as a case where the arbitrators left the question of costs undetermined. Where an award was attacked on the ground that an arbitrator had examined some witnesses without notice to the parties and that there was no joint execution of the award, the Court remitted the award, instead of setting it aside, as the mistakes were mere errors of judgment and were not due to any improper motive : *Anning* v. *Hartley*, (1858) 27 L. J.

Ex. 145. These are all illustrations of the arbitrator being guilty of misconduct, but not of such a nature that it would have been impossible for him to act fairly after remission of the award. But the question in a case under the Arbitration Act of 1940 will be :—"Does the act complained of comes within any of the sub-sections of sec. 15 ?"

Court can exercise discretion in remission if entitled by particular statute.

Where the impropriety or misconduct is of such a nature that the Court can set it aside, and the Court exercises its discretion in favour of setting aside the award, or remitting it after considering all the circumstances of the case, provided such power of remission is given to it by the particular statute applicable to the arbitration under consideration.

Indian decisions under Sch. II C. P. C. 1908 continue in application as new Act adopts its language.

The Indian decisions under the Civil Procedure Code, 1908, Second Schedule, para. 14, will, of course, continue to be applicable as its language has now been adopted in the new Act. This being so, reference is made to some of the Indian reported cases without any attempt at being exhaustive. (As regards illegality on the face of the award, see *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.*, 47 Bom. 578 P. C. and other authorities referred to in connection with this matter.) *Madepalli* v. *Madepalli*, 41 Mad. 1022, is an instance showing that although there were grounds for suspecting that the arbitrator might have gone wrong on the matter of Hindu Law of succession, yet as such an error, if any, did not appear in the award itself, the award could not be remitted for reconsideration by the arbitrator. *In Raoji* v. *Ratansi*, 54 Bom. 696, one of the parties to the

arbitration was a syndicate, and it was contended that the syndicate, not having been registered, was an illegal association by reason of sec. 4 of the Indian Companies Act, 1913. All that appeared was that the syndicate consisted of ten firms. Kemp, J. delivered himself thus : "If the illegality is not *ex facie* apparent, or if it is a mixed question of law and fact, or is a question the determination of which depends on extraneous facts, the Court is not bound to assume that the illegality exists or must necessarily come to light on a trial of the facts. The fact that illegality is subsequently established in other proceedings cannot overcome the plea of *res judicata* : *Shoe Machinery Co.* v. *Cutlan*, (1896) 1 Ch. 667 at p. 672" (at p. 705).

"Even if the facts could be considered suspicious the Court should not consider that they are incapable of explanation. Nor were the plaintiffs in the three suits warned by the issues raised at the trial that the point that the syndicate was not registered as a company was going to be pleaded :" (see *North Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*, (1914) A. C. 461" (at p. 706).

There needs be no separate finding on each issue although implied in reference.

As regards ground (*a*), namely, some of the matters referred not being determined, it is not necessary that there should be a separate finding on each issue : *Ghulam Jilani* v. *Muhammad Husain*, 29 I. A. 51. The same decision of the Judicial Committee points out that when parties refer their differences to arbitration, there is an implied condition that the arbitrator will decide all the issues, though such condition may be waived by consent of all the parties concerned :

(See also *Gnanendra* v. *Sures Chandra*, 5 Pat. 556.) In *S. & C. Nordlinger* v. *Chandmull Mulchand*, 28 C. W. N. 888, it was held that having regard to the statement in the award—"We have considered the papers," it was not a legitimate inference from the terms of the award that the arbitrators had decided against the buyers relying upon the mere fact that the latter were unwilling to produce the goods. Their Lordships referred to *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.*, 47 Bom. 578 P. C., as the authority for the proposition that the matter of the legality apparent on the face of the award must be construed within very narrow limits.

Technical view taken in 38 All. 380, although contrary was adopted in 29 I. A. 168 and 36 All. 336.

Quite a technical view of the situation was taken in *Hari Kunwar* v. *Lakshmi Ram Jain*, 38 All. 380. In respect of some of the disputes the parties there came to an agreement before the arbitrator, who, therefore, did not include those matters in his award. Technically the arbitrator was wrong as he ought to have made an award in terms of the agreement. This was an arbitration under para. 20, Second Schedule, Civil Procedure Code, 1908, that is, an arbitration without the intervention of a Court, and under para. 21, the award should have been ordered to be filed and decree passed thereon, if there were no grounds such as are mentioned in paras. 14 and 15. The Allahabad High Court proceeded on the view that, by reason of para. 21, it could either file or refuse to file the award, but it had no power to remit or amend the award. This view is supported by a large number of authorities of several High Courts, but those

decisions, it is submitted, are wrong having regard to the decision of the Judicial Committee in *Buta Singh* v. *Municipal Committee of Lahore*, 29 I. A. 168, where their Lordships separated the valid part of the award from the part in which the directions were in excess of the jurisdiction of the arbitrators. Also in another Privy Council decision, *Amir Begam* v. *Badruddin Husain*, 36 All. 336, the Judicial Commissioner had filed the award after setting aside the portion relating to Rasulabad property, which was separable from the rest of the award. This decision was confirmed by the Judicial Committee. On these authorities, it is submitted, that the judgment in *Hari Kumar* v. *Lakshmi Ram Jain*, 38 All. 380, can hardly be maintained as correct.

Error on face of award forms very narrow ground and jurisdiction of Court has to be administered with great care as adumbrated in 1893 1 Q. B. 405.

It has already been indicated that an error on the face of the award is a very narrow ground and the jurisdiction has to be administered with great care. In support of this proposition reference may as well be made to the statement of the law laid down by Kay, L. J. in *In re Keighley, Maxsted & Co.* (1893) 1 Q. B. 405 : "Prima facie, an award is final and not subject to appeal ; the arbitrator is chosen by the parties who presumably prefer a domestic tribunal which is not bound rigidly by the rules of evidence ; and a mistake of law or fact is not, per se, a ground for sending back the award of such a tribunal. The cases lay down with sufficient clearness the rules on which the Court ought to act when asked to remit on award"...(at p. 414).

On that point the language of sec. 16 is :—

"Remit the award or any matter referred".

It will be seen there are two different kinds of remission, namely :—

(1) Remit the award ;

(2) Remit any matter referred to arbitration.

Language of sec. 16 discussed.

If four matters have been referred and one only out of them is remitted, the award remains 'in a manner suspended' pending the second reference, as was held by Erle, J. in *Johnson* v. *Latham*, (1850) 19 L. J. Q. B. 329. Under sub-sec. (*3*) of sec. 16 an award remitted becomes void on failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed, but there is no provision to cover the case where instead of the award, 'any matter referred to arbitration' is remitted. *In re Aitken's Arbitration*, (1857) 3 Jur. (N. S.) 1296, only one question out of several left undecided was remitted. Apparently in a case like this, sec. 16(*3*) has no application.

Remission to New Arbitration

Remission to 'same' arbitrators not necessary under new Act.

In the Civil Procedure Code, 1908, para. 14, the provision is for remission to the "same arbitrators", while in the Indian Arbitration Act, 1899, the word 'same' does not appear, which is also the case in sec. 16 of the Arbitration Act, 1940.

Russell's view on point not supported.

The reported decision of *Lord* v. *Hawkins*, (1857) 2 H. & N. 55, hardly justifies the general statement in *Russell on Arbitration and Award*, 13th ed., p. 164 :—"It would seem that where, by the agreement to refer, the Court has power to appoint an arbitrator in place of one who has died, and an arbitrator dies after making his

award, the award may be remitted to a new arbitrator appointed by the Court in accordance with the provisions in the agreement to refer". The decision referred to is really based on the language of the particular arbitration agreement in the matter.

When arbitrator ceases office after award, remission to him still possible.

An arbitrator no doubt becomes *functus officio* on making his award, but that does not prevent the award from being remitted to him : *In re Stringer and Riley Bros.*, (1901) 1 K.B. 105.

Statutory Arbitrations

Statutory Arbitrations.

There are numerous English authorities on the question of the powers of remission being applicable or not to arbitrations under the various statutes, as by reason of sec. 46 of the Arbitration Act, 1940, all its provisions "shall apply to every arbitration under any other enactment for the time being in force", except secs. 7, 12 and 37, sec. 16 providing for remission of awards and sec. 30 for setting aside of awards are not excluded in the case of statutory arbitrations and are applicable to arbitrations under the Indian statutes.

Judgment on Award

Judgment on Award.

The next section of the Arbitration Act, 1940, namely, sec. 17, provides for judgment in terms of the award, where the Court sees no cause to remit the award or any of the matters referred to arbitration fit for reconsideration or to set aside the award. The provision for the setting aside of award appears much later in the Act, namely, sec. 30, but it is necessary to dispose of this matter in order to correctly

appreciate sec. 17 of the Indian Arbitration Act, 1940, which refers to both remission and setting aside of awards. This section is substantially a reproduction of para. 16, Second Schedule, Civil Procedure Code, 1908, and does away with the provision of sec. 15 of the Indian Arbitration Act, 1899, under which the award could be enforced as a decree, but would not amount to a decree for all purposes, namely, for the purpose of being made the foundation of insolvency proceedings : *In re a Bankruptcy Notice*, (1907) 1 K. B. 478 ; *Ramsahai* v. *Joylal*, 32 C. W. N. 608.

Sec. 17 taken with sec. 39 has set at rest conflicting decisions.

Sec. 17 taken with sec. 39 of the Arbitration Act, 1940, has set at rest various conflicting decisions of the different High Courts in connection with the appealability or otherwise of orders made under the Indian Arbitration Act, 1899, and the Second Schedule of the Civil Procedure Code, 1908,—a topic which will be dealt with concisely when sec. 39 is considered.

Scheme so far dealt with from secs. 1 to 17 ; sec. 30 to come up next, after which treatment of secs. 18 to 29 will follow.

The point to which attention is drawn is that the scheme followed has been to take up the matters which form the subject-matter of sec. 1 to 17 inclusive of the Arbitration Act, 1940, and it is now intended to deal with sec. 30, after which secs. 18 to 29 will be taken up, and later secs. 31 to 49 and the Schedules to the Act.

LECTURE VII

GROUNDS FOR SETTING ASIDE AWARD

Setting Aside Award

Authorities dealing with setting aside of award, comparison and contrast in tabular form.

The authorities, English and Indian, dealing with the setting aside of award are very numerous, but to appreciate them, it is necessary to remember the language used in the English Arbitration Act, 1889, the Indian Arbitration Act, 1899, the Civil Procedure Code, 1908, Second Schedule, and the Indian Arbitration Act, 1940, respectively. For convenience of reference the relevant provisions are set out in a tabular form on the next page.

Comparison of sec. 30 of Act 1940 with sec. 14 of Act 1899.

It is useful to compare sec. 30 of the Arbitration Act, 1940, which states three grounds in sub-cls. (*a*), (*b*) and (*c*), with the law as appearing in sec. 14 of the Indian Arbitration Act, 1899, where the two grounds stated were—

(*1*) That an arbitrator or umpire has misconducted himself ; or

(*2*) That an arbitration or award has been improperly procured.

It will be noticed that the words "or the proceedings" have been added in sub-cl. (*a*), Indian Arbitration Act, 1940, after the words "has misconducted himself." There was nothing in the Arbitration Act, 1899, corresponding with sub-cl. (*b*) of sec. 30 of the Act of 1940, which relates to the making of an award after the Court's order superseding the arbitration, or an arbitration having become invalid by reason

SETTING ASIDE AWARD :
COMPARISON AND CONTRAST

ENGLISH ARBITRATION ACT, 1889	INDIAN ARBITRATION ACT, 1899	C. P. CODE, 1908, SECOND SCHEDULE	INDIAN ARBITRATION ACT, 1940
Sec. 11(*2*)—Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside. Note—The words "or the proceedings" have been added after the words "misconducted himself" by the English Arbitration Act, 1934.	Sec. 14—Same as in Col. 1.	Para. 15.....but no award shall be set aside except on one of the following grounds, namely :— (*a*) Corruption or misconduct of the arbitrator or umpire ; (*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wrongfully misleading or deceiving the arbitrator or umpire ; (*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.	Sec. 30—An award shall not be set aside except on one or more of the following grounds, namely :— (*a*) that an arbitrator or umpire has misconducted himself or the proceedings ; (*b*) that an award has been made after the issue of an order by the Court superseding the arbitration, or after arbitration proceedings have become invalid under sec. 35 ; (*c*) That an award has been improperly procured or is otherwise invalid.

of a legal proceeding having been commenced on the whole of the subject-matter of the reference, and notice thereof having been given to the arbitrators or the umpire. Further a very important change in the language has been made by the addition of the words "or is otherwise invalid" in the Act of 1940. On reference to the tabular statement it would be found that in the Civil Procedure Code, 1908, the general ground, namely, "award being otherwise invalid" was embodied in it. Those words are now appearing in the Act of 1940 and were not to be found in the Arbitration Act of 1899.

Ground for setting aside of award after supercession of arbitration or commencement of legal proceedings absent in Act 1899.

The ground for setting aside of an award after the Court's order superseding the arbitration or after the commencement of legal proceedings, etc., appearing in the Civil Procedure Code of 1908 and now embodied with modification in the Act of 1940 was equally absent from the Arbitration Act of 1899. It is important to bear these differences in mind in connection with rulings under the Civil Procedure Code of 1908 and the Indian Arbitration Act of 1899 respectively.

Uniform law laid down by Act 1940 for setting aside of award.

The Arbitration Act of 1940, having laid down a uniform law as to the grounds of setting aside an award, has effected a desirable improvement, whereas previously different languages had to be interpreted depending on whether, for instance, a house, the subject-matter of a reference, was situated on the East or the West of the Circular Road, Calcutta.

Whether arbitrator's mistake covered by

Turning to sec. 30 of the Arbitration Act, 1940, which gives the present law on the subject, the question may be asked, is an arbitrator's

mistake covered by any of these grounds ? The making of a mistake by an arbitrator may amount to "misconduct," and if so, will it make an award liable to be set aside on the ground "it is otherwise invalid ?" The word used is "misconducted himself". Does it cover the case of "judicial misconduct", where the same is not apparent on the face of the award ?

any of grounds under sec. 30.

As to what is legal misconduct, Mahmood, J. has laid down that it does not "necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators and of what Courts of Justice expect from them before allowing finality to their awards" : *Ganga Sahai* v. *Lekhraj*, 9 All. 253.

'Legal misconduct' as *per* Mahmood, J.

In considering the English authorities, it has to be borne in mind that the English Arbitration Act, 1889, like the Indian Arbitration Act, 1899, merely laid down that an award might be set aside, where an arbitrator or umpire had misconducted himself, or the award has been improperly procured. As already noticed neither of these Acts said anything about the award "being otherwise invalid" or of error on the face of the award.

English and Indian Acts mentioned nothing about award 'being otherwise invalid'.

It is only the Civil Procedure Code, 1908, which used the words "where an objection to the legality of the award is apparent upon the face of it," in connection with the Court's power to remit awards in the Second Schedule, para. 14(*c*), and which also used the words "or being otherwise invalid" in connection with the setting aside of awards : Second Schedule, para. 15(*c*).

C.P.C. 1908 used "objection to legality of the award up on the face of it' in respect of Court's power for remission of award.

In spite of the language of the English

Certain principles established despite languge of old English and Indian Acts.

Arbitration Act, 1889, and the Indian Arbitration Act, 1899, certain principles have become well established, although neither of these statutes makes any reference to illegality or error apparent on the face of the award. These principles require consideration now keeping out for the moment the decisions under the Civil Procedure Code of 1908.

Liability of Award to be Set Aside by Reason Of Error Apparent on its Face and Exception to this General Rule

English authorities on liability of award to be set aside by reason of error apparent on its face and on exceptions to general rule.

The English authorities are too numerous to be referred to here in detail, but an attempt will be made to bring out the principles enunciated by them. In *Buerger* v. *Barnett*, (1919) 89 L. J. K. B. 161, it has been ruled that where an error, whether of fact or of law, appears on the face of the award, the award will be set aside, unless the error is immaterial to the decision. In one of the cases frequently referred to in later decisions, namely, *Hodgkinson* v. *Fernie*, (1857) 3 C. B. (N. S.), 189, it has been recognised that the principle has become firmly established that where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award, that will constitute a ground for the award being set aside. A general statement that an award is liable to be set aside if there is any error of law apparent on its face is likely to be misleading, as a distinction has been drawn between two classes of cases relating to errors of law by arbitrators.

This distinction is enunciated very clearly in

Absalom Ltd. v. *Great Western (London) Garden Village Society Ltd.*, (1933) A. C. 592. The following is a quotation from the report at p. 607 :—"My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

Distinction between two classes of cases relating to error of law enunciated in (1933) A. C. 592.

In other words, if *A* and *B* refer specific questions of law to an arbitrator, the award will not be set aside on the ground of error of law for the arbitrator's mistake, even if mistake is apparent on the face of the award. On the other hand, if certain matters are referred to the arbitrator and he makes an error of law apparent on the face of the award relating to a question of law material for his decision, then the award is liable to be set aside.

Arbitrator's mistake about law no ground for setting aside when reference was on question of law and mistake was apparent on face of award.

While these principles are easy to enunciate, the difficulty of their application will appear from the case just referred to, namely, *Absalom's* case, (1933) A. C. 592, and some other cases to be mentioned later in this discussion. The dispute there was between a building contractor and his employer, and the matters referred to

Difficulty of application of principles enunciated in (1933) A. C. 592.

arbitration were : (1) whether contractors were entitled to architects' certificates having regard to clause 30 in the contract providing for the conditions upon the fulfilment of which certificates were to be issued ; and (2) whether the contractor had suspended work enabling the architect to give him notice as provided for in another clause. The arbitrator awarded (1) that "having regard to clause 30 the architect had issued cirtificates in accordance with that clause, and (2) that "notices given by reason of the contractor suspending work was proper and valid." It would appear from what has been said that the facts were not complicated and for deciding under which of the two classes abovementioned this case should be placed, all that the Court had to decide was to read the two clauses in the contract and the two questions referred to the arbitrators. An application was made to set aside the award. Swift and Macnaghten, JJ. held that in this case error was apparent on the face of the award as the arbitrator had misconstrued clause 30. On appeal, Scrutton and Greer, L. JJ., were confident that the construction of clause 30 was left to the arbitrators and, therefore, the award could not be attacked on the ground of error of law apparent on the face of the award.

The matter was taken to the House of Lords. The five learned Lords set aside the judgment of the Appeal Court holding that the arbitrator had wrongly interpreted clause 30 of the contract and that the question of interpretation of this section had not been expressly or specifically left to him, and, therefore, the award

should be set aside for error of law appearing on the face of it. Lord Russell of Killowen after stating, "Greer, L. J. thought that since the arbitration clause included questions of construction, the very point of construction which the arbitrator decided had been submitted to him for his decision," expressed his dissent from this view of the matter.

In explaining the difference between the two classes of cases, Lord Wright, after saying that the rule laid down in *Hodgkinson* v. *Fernie*, (1857) 3 C.B.(N.S.) 189, "that where an error of law appears on the face of the award the error can be reviewed, is a well established part of the law of the land" proceeded to say "the rule in truth applies to the ordinary case where, in the words of Lord Dunedin in, (1923) A. C. 488, the submission refers "to the arbitrator the whole question whether it depends on law or on fact. To be contrasted with such cases there is the special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific questions of law in express terms as the separate question submitted ; that is to say, where a point of law is submitted as such, that is, as a point of law which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute."

In *Absalom's* case their Lordships considered many of the earlier cases, and as it is not con-

sidered necessary to discuss all these cases separately in detail, it may be useful to give the following quotation from the judgment of Lord Wright at pp. 615 and 616 :—"Such a case", that is, a case which has been called by Lord Wright a case of the special type, "is illustrated by the *Government of Kelantan* v. *Duff Development & Co.*, (1923) A. C. 395, where Lord Cave, L. C., whose opinion was in agreement with that of the majority of the House, said :—"but where a question of construction is the very thing referred to arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion." This House held in that case that the only questions to be determined by the arbitrator, there being no facts in dispute, where the questions of law as to the construction of the contract. That decision was followed in *In re King and Duveen*, (1913) 2 K. B. 32, in which Channell, J. said, in distinguishing the case of the *British Westinghouse Co.* v. *Underground Electric Railways Co.*, (1912) A. C. 673 : "It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of being set aside." "In *Attorney-General for Manitoba* v. *Kelly*, (1922) 1 A. C. 268, Lord Parmoor, delivering the judgment of the Privy Council, repeated and approved the distinction drawn by Channell, J." Lord Wright justified his judgment by stating at p. 616 : "There is no reason to think that the

Quotation from Wright, J.'s judgment in *Absalom's* case.

parties had any specific questions of law in mind at all. What was wanted was a practical decision on the disputed issues."

(1934) 150 L. T. R. 127 shows arbitrators not safe even when they rely on judges' opinions.

The case of *Barton and another* v. *Blackburn and another*, (1934) 150 L. T. R. 327, shows among others, that sometimes the arbitrators are not on safe ground even when they rely on opinions of learned Judges. In this case the arbitrator acted upon and incorporated in his award the opinion of Farwell, J., which he obtained by stating a case for opinion. While the Divisional Court agreed with this opinion ; on appeal, by majority of two to one, the Court decided that the opinion of Farwell, J. was wrong, and, therefore, there was error apparent on the face of the award. A similar misfortune fell to the lot of the arbitrator in the case reported as *Landauer* v. *Asser*, (1905) 2 K. B. 184.

41 Mad. 102 erroneous in decision according to law laid down in (1933) A. C. 592.

The law as laid down in *Absalom's* case, (1933) A. C. 592, makes certain judgments of Indian High Courts look erroneous, for example, *Madepalli Venkata Swami* v. *Madepalli Surenna*, 41 Mad. 1022. There was no specific question of law referred to the arbitrator and that was a case where the words of Lord Dunedin already quoted, namely, :—"The submission was of the whole question, whether of law or fact" exactly applied and yet the Court held that the arbitrator had jurisdiction to decide all questions, and, therefore, error of law on his part did not matter and proceeded to lay down the astounding proposition that an award can be set aside only if the arbitrators act perversely and manifestly misapply a rule of law. Their Lordships relied on a number of Indian and

English cases, but admittedly omitted to take notice of the crucial matter, namely, the distinction of the two classes of cases, which is so clearly pointed out in *Absalom's* case, (1933) A. C. 592, and it is submitted that they completely misunderstood cases, like *In re King and Duveen*, (1913) 2 K. B. 32, cited by them in their judgment—a fact which will be clear from the passages in the judgment of Channell, J. already quoted. Incidentally it may be pointed out that the *Kelantan* case, (1923) A. C. 395, has been correctly explained in *Gopinath* v. *Salil Kumar*, (1938) 2 Cal. 349.

Similarly in *Sakrappa* v. *Shivappa*, 35 Bom. 153, the *ratio* of the decision seems to be that the question to be answered is whether the arbitrators *bona fide* took an erroneous view of the law and that sufficient attention was not paid to the distinction between the two classes of cases as explained in *Absalom's* case, (1933) A. C. 592 and other authorities above discussed. In the *British Westinghouse Company's* case, (1912) A. C. 673, already mentioned, the arbitrator had just, as in two instances already given, really bad time. Contractors having supplied turbines to a Railway Company, dispute arose as to whether the turbines not being in terms of the contract, it was proper for the Railway Company to buy substituted turbines for mitigating damages. The cautious arbitrator wanted to be sure that his award would not be set aside on the ground of error of law apparent on the face of it and he secured the opinion of the Court by stating a case for opinion and made his award basing it on the judgment of Harrington and Avery, L. JJ.

The dissatisfied party applied before Pickford and Lush, JJ. for setting aside the award as being erroneous in law on the face of it, but the learned Judges felt bound by the answer given by the Divisional Court and dismissed the application. From this dismissal there was an appeal which was heard by Vaughan Williams, Buckley and Kennedy, L. JJ., and two of them held that the appeal had failed on its merit. The matter was taken to the House of Lords, and the four learned Lords remitted the award holding that, although the arbitrator had acted on the opinion of three learned Judges, that opinion was wrong, and, consequently, there was an error of law apparent on its face. It will be seen that the *ratio* of the decision in *British Westinghouse Company's* case, (1912) A. C. 673, was that no specific question of law had been submitted. The matters referred were a claim for the price of goods on the one hand and a counter-claim for damages on the other. Questions of law arose which had to be decided as being material in the decision on their respective claims. Discussions of the distinction between the two classes of cases will also be found in *Arcos Ltd.* v. *London & Northern Trading Co. Ltd.*, 45 Ll. L. Rep. 297.

What is Error Apparent on the Face of Award

Cases of error apparent on face of award.

Does it mean that the error must be found in the award itself, or is it permissible to consider any other facts or documents ? It sometimes happens that with the award the arbitrator delivers a document expressing or explaining his reasons for the award. In such a case the Court will look into such paper or document for finding

out if the arbitrator had erred in law, provided such document is considered to be part of the award : *Holmes* v. *Higgins*, (1822) 1 B. & C. 74.

For an instance of the award being remitted, because erroneous reasons were stated by the arbitrator in a document prepared by him after making his award : see *In re Dare Valley Rail Co.*, (1868) L. R. 6 Eq. 429. A similar situation was also discussed in *In re Brandt and Boutcher*, (1890) 7 T. L. R. 140. In *S. & C. Nordlinger* v. *Chandmull Mulchand*, 28 C. W. N. 888, it was ruled that for deciding whether there was an error on the face of the award "one is entitled to consider the award itself and any documents incorporated in it." The Court, therefore, considered the written statement filed before the arbitrator inasmuch as the award referred to it. On the other hand, in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.*, 47 Bom. 578 ; (1923) A. C. 480, their Lordships held that the error of law must appear in the award or in any document actually incorporated with it, and although the award recited that the contract was subject to the rules of the Bombay Cotton Trading Association, yet they held that those rules were not so incorporated in the award that the Court could consider them for ascertaining whether there was an error of law on the face of the award. Another instructive case is *Saleh Mohomed Umer Dossal* v. *Nathoomall Kessamall*, 54 I. A. 427. There was a reference to the contract between the parties in the award, and the contention was that if the contract is treated as incorporated in the award, it could be shown that the arbitrator had made

a mistake about the weight of the goods. Their Lordships, in negativing this contention, held that though the contract was alluded to, it was done for the purpose only of earmarking the origin of the dispute in question. In other words, the judgment of their Lordships proceeded on the footing that a mere reference to the contract in the award as part of the history of the dispute had not the effect of incorporating the contract in such a manner that it could be looked into for ascertaining whether any mistake was appearing in the award.

No magic in word 'incorporation'.

Whether a document has become incorporated in the award must be a question of fact in each case, and there is no magic in the word "incorporation." The word has no technical significance and it has been explained in different language by different Judges. For instance, in *Holgate* v. *Killick*, (1861) 7 H. & N. 418, the Court referred a certain matter to the Master as arbitrator. The Master gave his award finding that nothing was due to the plaintiff from the defendant and gave certain directions as to costs. Contemporaneously the Master wrote a letter to the defendant's attorney asking the plaintiff's attorney to deliver it to him. In this letter the Master gave elaborate reasonings for his decision and it was contended that the letter was part of the Master's certificate or award and that it clearly showed an error of law. In rejecting this contention, Bramwell, B. said : "I am not dissenting from anything that was said by this Court in *Hogge* v. *Burgess*, (1858) 3 H. & N. 293, or by the Court of King's Bench in *Kent* v. *Elstob*, (1802) 3 East

18, where it was held that a paper delivered contemporaneously with the award formed part of it. Those decisions were right upon the facts. In *Leggo* v. *Young*, (1855) 16 C. B. 626, Maule, J., explains *Kent* v. *Elstob*, and says: "There the arbitrator delivered with his award a paper containing observations upon the evidence laid before him, and his reasons for making the award as he did. That, therefore, was a paper, which substantially formed part of the award, and was intended to do so. Here, however, there is no document delivered with the award to both the parties, but merely a letter addressed to one of them, intimating the umpire's regret that he could not give him the costs" (at p. 421). The learned Judge then explains "contemporaneous writing" to mean a writing intended to form part of the award, and states: "In this case the letter forms no part of the award, but is only advice given by the Master in order that the parties may not waste their time and money in future litigation."

Erroneous view of bye-laws constitutes error of law on face of award.

If the reference to arbitration is under the rules of a body, like the East India Cotton Association, or the Bengal Chamber of Commerce, and if the arbitrator proceeds on any of their bye-laws, an erroneous view taken by him of the legal effect of such bye-law will result in an error of law apparent on the face of the award: *Meenakshi Mills Ltd.* v. *Langley & Co.*, 58 Bom. 288.

Mistake of Fact appearing in Award

If there is a substantial mistake of fact appearing in the award or in any contemporaneous

document as explained above, it stands on the same footing as error in law: *Hogge* v. *Burgess*, (1858) 3 H. &. N. 293 (at p. 298).

Mistake of fact akin to error in law.

An award containing no error of law but mistakes as to names, dates, description, etc., is liable to be set aside: *Davies* v. *Pratt*, (1855) 16 C. B. 586.

Mistake not Apparent on Face of Award

Is there any exception to the general rule that error must have appeared in the award or a "contemporaneous document ?" On this question the earlier English cases show attempts on the part of Judges for getting away from the rigidity of the rule that error must appear on the face of the award for preventing injustice or hardship. It is an illustration of what is not unusual, namely, hard cases contribute to the making of bad law.

Earlier English cases attempt to get away from rigidity of rule.

In re Hall and Hinds, (1841) 10 L. J. C. P. 210. *A* admitted that he had to pay *B* £143. The arbitrators found that there was £75 more due, but instead of adding up the two figures, deducted one from the other and awarded the difference to *B*. One would think that this was an error apparent in the award, and indeed in a later case, *Phillips* v. *Evans*, (1843) 13 L. J. Ex., 80, Baron Parke said that this was error apparent on the face of the award, a case which in its turn has been seriously doubted in later decisions. However, in *Hall and Hinds*, the Court, instead of proceeding on the ground of error appearing on the face of the award, held that the mistake was 'mere clerical mistake' and that "the mistake, as a matter of carelessness

is so gross as to amount, though not in a moral point of view yet in the judicial sense of that word, to misconduct on the part of the arbitrators." The Court in this case has unduly stretched the meaning of the expression "clerical mistake." In the above case the arbitrator put in an affidavit admitting his mistake, while in the later case of *Phillips* v. *Evans*, (1843) 13 L. J. Ex. 80, there was an affidavit of one of the parties stating that the arbitrator had admitted his mistake, that is, his omission to consider a sum admitted by the defendant. Baron Parke refused to set aside the award holding that although that might mean injustice in a particular case, yet the principle of an award being bad on the ground of error, unless such error was apparent on the face of the award, should not be extended to the facts of the case before him.

Modern view follows not *Phillips* v. *Evans*.

In *Russell on Arbitration and Award*, 13th. Ed., p. 355, the opinion is expressed that no Court would now follow *Phillips* v. *Evans* and enunciates the exception from the general rule in the following terms, namely :—"That if upon distinct evidence it is shown that the arbitrator has made a gross mistake, whether of fact or law, contrary to his judgement and intention, that will amount to personal misconduct or misconduct of the proceedings for which the award may be set aside." But it must be confessed that it is not easy to reconcile with one another the different English authorities on the question what is "distinct evidence".

Where the mistake is admitted by the arbitrator and the parties, there is no difficulty for remission of the award : *Flynn* v. *Robertson*,

(1869) 38 L. J. C. P. 240, but while following this case a further limitation was insisted on in *Dunn* v. *Blake*, (1875) 44 L. J. C. P. 276 by stating that in connection with mistakes not appearing on the face of the award—"It is only where the arbitrator himself comes to crave the assistance of the Court to enable him to rectify his own mistake, that the Court has power to send back the award to him for that purpose."

No difficulty where mistake is admitted by arbitrator and parties.

In connection with mistakes not appearing on the face of the award, it is not always easy to draw a sharp line of demarcation between 'admitted mistakes' and 'mistakes not admitted'. The authorities, however, make it clear that the Courts are extremely unwilling to act on mistakes which do not appear on the face of the award.

Difficult to distinguish 'admitted mistakes' and 'mistakes not admitted'.

Whatever may be the law in England, under the Arbitration Act, 1940, the power to remit is limited to the objection to the legality of the award apparent on the face of it under sec. 16(*c*), though under sec. 30(*c*) an award may be set aside if it "is otherwise invalid" ; and setting aside of the award is the only remedy available in India and not remitting the award where the Court can be induced to act on mistakes not appearing on the face of the award. It has been pointed out earlier that in sec. 30(*a*) of the Arbitration Act, 1940, the words are "misconducted himself or the proceedings", and that the words "or the proceedings" have been adopted by the Arbitration Act, 1940, taking them from the English Arbitration Act, 1934. The statute, therefore, mentions two varieties of misconduct, namely ; (1) misconduct personal to the arbi-

Remitting of award limited to illegality appearing on face of it, although setting aside only remedy available in India.

trator, which, as interpreted, includes "judicial misconduct," and (2) the arbitrator misconducting the proceedings.

The question then naturally arises what is the effect of adding the words "misconducting the proceedings ?"

Instances of arbitrators misconducting proceedings.

Many instances have already been given of arbitrators misconducting proceedings, for example, examining a witness in the absence of one of the parties, and in such cases awards have been set aside under statutes which had only the words "arbitrator misconducting himself," and said nothing about "misconducting the proceedings." Does the addition of the words "misconducting the proceedings" widen the ground on which awards can be set aside ? It is submitted that such is not the case, but that the Legislature only wanted to clarify the situation already existing by the addition of these words.

Award in Excess of Jurisdiction of Arbitrators

Award in excess of jurisdiction.

Where the award goes beyond the authority of the authority given to the arbitrator by the arbitration agreement, without rendering him necessarily guilty of moral turpitude, he becomes party to "judicial misconduct", inasmuch as it is his duty to decide neither more or less than the differences submitted to him. This excess of authority need not necessarily appear in the award itself, but may be proved independently, and it will be set aside, unless the bad part is clearly separable from the part within their authority and does not affect the latter part : *Bowes* v. *Fernie,* (1838) 4 My. & Cr. 150. An

award which goes beyond the terms of reference is to that extent *ultra vires* : *Raja Mumtaz Ali Khan* v. *Shakhawat Ali Khan*, 28 I. A. 190, and awards on matters not submitted are liable to be set aside : *Tandy* v. *Tandy*, (1841) 9 Dowl. 1044 ; *Porter* v. *Porter*, (1921) 55 I. L. T. 206. If the submission is for deciding whether the title to a property is good, an award that it should be accepted with the defective title with an indemnity would be bad : *Ross* v. *Boards*, (1838) 8 A. & E. 290 ; similarly where the reference is for division of partnership assets, but the award is for one partner taking over the entirety : *Wood* v. *Wilson*, (1835) 4 L. J. (N. S.) Ex. 193.

It is permissible for a party asking for setting aside of the award to show the possibility of the arbitrator having considered matters not within his jurisdiction, but he cannot succeed unless he proves positively that the arbitrator did in fact exceed his jurisdiction : *Falkingham* v. *Victorian Railways Commissioners*, (1900) A. C. 425. Instances of arbitrators exceeding jurisdiction are very numerous and other examples will be found *inter alia* in *Quebec Improvement Co.* v. *Quebec Bridge and Rail Co.*, (1908) A. C. 217 ; *Price* v. *Popkin*, (1839) 10 A. & E. 139 ; *In re Stoker and Morpeth Corporation*, (1915) 2 K. B. 511.

What is improper procuring of award.

Returning to sec. 30 of the Arbitration Act, 1940, it will be seen that the discussion so far has been based on the words "otherwise invalid" in sub-section (*c*). The other ground in the sub-section is whether "the award has been improperly procured." What is improper "procuring" of an award and what examples can be

given therefor from reported decisions? One case is, of course, obvious, namely, whether the arbitrator has been bribed or has without the knowledge of a party become personally interested in the subject-matter of the reference: *Blanchard* v. *Sun Fire Office*, (1890) 6 T. L. R. 365. Another instance arises where matters, of which the arbitrator ought to have been informed, are fraudulently concealed by a party, or he is guilty of misleading or deceiving the arbitrator. The authorities usually relied on for this proposition are mostly cases decided long ago, but they are still good law and none the worse for their age: *Gartside* v. *Gartside*, (1796) 3 Anst. 735; *Mitchell* v. *Harris*, (1793) 2 Ves. jun. 129; *South Sea Company* v. *Bumstead*, (1734) 2 Eq. Cas. Ab. 80.

Exceptions to above rule.

An attempt to set aside an award as being improperly procured failed in *Pilmore* v. *Hood*, (1840) 8 Dowl. 21, where the ground was that a witness had made false statements, and also in *In re Glasgow and South Western Railway Co.* and *London and North Western Railways Co.*, (1888) 52 J. P. 215, where the ground was that the evidence of a material witness was contrary to that given by him in another matter.

Whether 'otherwise invalid' to be construed *ejusdem generis*.

It is necessary to revert to the discussion of the expression "otherwise invalid" in sec. 30(*c*) to ascertain whether the expression is to be construed *ejusdem generis*, i. e., whether the invalidity must be of the same nature as that indicated by the other words in the same sub-clause. In the Arbitration Act, 1940, the words preceding "or is otherwise invalid" are "that an award has been improperly procured."

In the Second Schedule of the Civil Procedure Code, 1908, para. 15(*c*), the words are :—"the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid." In a decision governed by this provision, Mitter, J. said in *Durga Charan Debnath* v. *Ganga Dhar Debnath*, 34 C. W. N. 813 at p. 815 :—

34 C. W. N. 813 decision on para 15(*c*) C. P. C. 1908 on 'or being otherwise invalid'.

"An examination of cl. (*c*) of sub-sec. (*1*) of sec. 15 will show that the words "or being otherwise invalid" must refer to invalidity of the kind referred to in the preceding sentences of the said clause, as for instance the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court." It is submitted that there is no justification for this *ejusdem generis* construction, and awards have been set aside as being "otherwise invalid" on grounds which are not *ejusdem generis* with what has gone before in the sub-clause. For an instance, reference may be made to *Ram Pratap* v. *Durga Prosad*, 53 Cal. 258, where the Judicial Committee set aside an award on the ground that part of it covered matters which were the subject of a pending suit. This ground was certainly not *ejusdem generis* with the other grounds in sec. 15(*c*). Again, under this head falls the setting aside of awards on the ground of error or illegality appearing on the face of the award. It has been noted that in clause (*c*) of sec. 30 of the Arbitration Act, 1940, in addition to "otherwise invalid", the other

ground is "improperly procuring the award". It has thus adopted the language of the Indian Arbitration Act, 1899, and not of the Civil Procedure Code, where the expressions are "corruption", "fraudulent concealment", "wilfully misleading or deceiving the arbitrator or umpire". This change in the language is immaterial, because even in statutes where the language was "improperly procuring" and no mention was made of "fraudulent concealment" or "deceiving", the following have been held to come under the expression "improperly procuring the award" :—

Instances of improperly procuring.

(*1*) Misleading or deceiving the arbitrator : *Gartside* v. *Gartside*, (1796) 3 Anst. 735 ; *Mitchell* v. *Harris*, (1793) 2 Ves. jun. 129, already referred to ;

(*2*) Bribing or treating the arbitrator : A very curious case is that of *In re Hopper*, (1867) 36 L. J. Q. B. 97, where an umpire drunk at the expense of a party made an award. The Court refused to set aside the award on the ground that there was nothing to show that the party had intended to corrupt or influence the mind of the umpire or that the latter was in fact influenced by the conduct of the party. It may be doubted whether the decision is correct, but arbitrators will be wise in not getting drunk, or be treated in any manner at the expense of a party on the strength of this decision. Other instances will be found in *In re Maunder*, (1883) 49 L. T. 535 and *Moseley* v. *Simpson*, (1873) 42 L. T. Ch. 739. In the latter case the Court refused to set aside the award, but remarked that it would have been wiser for the arbitrators not to have lunched

with one of the parties, which they did on several occasions.

The Indian Arbitration Act, 1940, sec. 30(*b*). —The difference in the language of this sub-sec. from that of para. 15(*c*) of the Civil Procedure Code, 1908, will be found from the comparative table which has already been given. The last words of this sub-section are "or after arbitration proceedings have become invalid under sec. 35". Sec. 35 which deals with the effect of legal proceedings on arbitration will be taken up later and its consideration is being postponed for the present.

We are thus left so far as sec. 30(*b*) is concerned with the ground "that an award has been made after the issue of an order by the Court superseding the arbitration."

In the Civil Procedure Code, 1908, in para. 15(*c*), there was an additional ground, namely, an award having been made "after the expiration of the period allowed by the Court."

What then is the position under the Arbitration Act, 1940, of an award made after such expiration ?

When arbitrators or umpires become *functus officio*.

It has been held that arbitrators or umpires become *functus officio* on the expiration of the time fixed for making the award and then they have no power to enlarge the time : *Dreyfus and Co.* v. *Arunachala Ayya*, 58 I. A. 381.

Where no time was fixed for making the award, but there was a delay of five years, the award was held to be invalid on the ground that the long and unexplained delay amounted to misconduct on the part of the arbitrator :

Bhogilal Purshottam v. *Chimanlal Amritlal*, 52 Bom. 116 following *Coley* v. *DaCosta*, 17 Cal. 200.

Reference may be made in this connection to the judgment of Rankin, J., in which he held that parties by consenting to extension of time was not estopped from objecting to the continuance of the proceedings *ad infinitum* or after the arbitrators had proved themselves incorrigible : *Robindra Deb Manna* v. *Jogendra Deb Manna*, 27 C. W. N. 420.

Under the Civil Procedure Code of 1882, the Judicial Committee held that an award made after the date fixed by the Court was altogether null and void, and, therefore, it was unnecessary to set it aside : *Raja Harnarain* v. *Chaudhrain Bhagwant*, 13 All. 300 P. C., but it has been held under the Civil Procedure Code of 1908 that such an award, being voidable and not void, requires to be set aside : *Patto Kumari* v. *Upendra Nath*, 4 Pat. L. J. 265. By reason of sec. 28 of the Arbitration Act, 1940, the Court has power to enlarge the time for making the award, whether the time for it has expired or not.

While under the Act of 1940 a remitted award becomes void on failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed for it by the Court. It is submitted that it will be liable to be set aside as being "otherwise invalid", unless the power of enlargement of the time after its expiry is exercised by the Court.

It only remains to consider sec. 30(*a*) of the Act of 1940, namely, that an arbitrator has misconducted himself or the proceedings.

Most of the topics coming under this head have already been discussed, such as, arbitrators improperly proceeding *ex parte*, improperly delegating their duties, hearing evidence in the absence of all the parties, improperly accepting or rejecting evidence, making private enquiries, all arbitrators not being present at all meetings, their determining matters not referred to them, making an award which is not final or certain, etc., etc. The subject, however, covers a very wide field and the observations now going to be made may be taken as supplementary to what has already been said.

(1) Unless the arbitration agreement so provides, an award by a majority of arbitrators is not a valid award. Even where there is such a provision, the majority must consult the rest. Most of the authorities, Indian and English, bearing on this matter have been elaborately discussed by Mookerjee, J. in *Abu Hamid Zahira Ala* v. *Golam Sarwar*, 22 C. W. N. 301 and the summary given by him is set out below :—

"Lord Denman observed in *In re Pering*, (1835) 3 Ad. & Ell. 245, any two under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after discussion with the other arbitrators. If after discussion it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him." Coleridge, J. added : "The parties have not got what they stipulated for. They stipulated that two at least should make the award ; but no two could make it till each arbitrator had been consulted."

This view accords with that adopted in *Peterson* v. *Ayre*, (1854) 14 C. B. 665 ; *White* v. *Sharp*, (1844) 1 C. & K. 348 ; *In re Templeman*, (1841) 9 Dowl. P. C. 962 ; *Burton* v. *Knight*, (1705) 2 Vernon 514 ; *Morgan* v. *Bolt*, (1863) 7 L. T. N.S. 671 ; and *Doberer* v. *Megaw*, 13 Can. S. C. 125."

"We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made ; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to make a majority award ; even where less than the whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators" (at p. 303).

(2) The award must be complete, certain and final.

If an award does not decide all the issues between the parties, it is liable to be set aside : *Kilburn* v. *Kilburn*, (1845) 13 M. & W. 671 ; but if the arbitrator decides an issue which disposes of the whole cause of action, and as the result of that decision, the plaintiff can get no relief against the defendant, then the fact of the other issues having been left undecided becomes immaterial : *Warwick* v. *Cox*, (1844) 1 D. & L. 986.

Whether the award is incomplete must of

course depend on the terms of the submission. Where the submission was for a direction on *A* to pay to a bank money sufficient to meet the claim which the bank had on certain documents belonging to *B*, and the arbitrator directed that *A* should pay to the bank a sum sufficient to entitle *B* to have the documents from the bankers, the award was set aside as incomplete, because there was no finding as to the exact amount due to the bank for the release of the documents in question : *Hewitt* v. *Hewitt*, (1841) 1 Q. B. 110.

A complaint cannot be made that the arbitrator has not decided a particular matter, unless the point was specifically raised during the arbitration proceedings : *Manindra Mandal* v. *Mahananda Roy*, 15 C. L. J. 360 ; *Rees* v. *Walters*, (1847) 16 M. & W. 263. The position will be the same where the matter undecided is one upon which there was no dispute, *Cargey* v. *Aitcheson*, (1823) 2 B. & C. 170. If the award is uncertain or doubtful, it is liable to be set aside : *Mortin* v. *Burge*, (1836) 4 A. & E. 973 ; *In re Tribe and Upperton*, (1835) 3 A. & E. 295. Where an award decided that one of the parties should take all reasonable precautions from preventing the water of the stream from being rendered unfit for the use of the other party, the award was set aside as being uncertain as there was nothing to indicate exactly what precautions were to be taken : *Stonehewer* v. *Farrar*, (1845) 6 Q. B. 730. Similarly an award to pay over such amount as may have been received would be bad if the amount is not mentioned : *In re Marshall and Dresser*, (1842) 3 Q. B. 878. In this case

not only no amount was stated but the arbitrators had also not laid down any rule or method by which the exact amount could be ascertained.

If the award states the rule for calculation of the amount to be paid without stating the figure arrived at by such calculation, the award is not uncertain on the principle "*id certum est quod certum reddi potest*" : *Manindra Mandal* v. *Mahananda Roy*, 15 C. L. J. 360 ; *U. M. Chowdhury and Co.* v. *Jiban*, 49 Cal. 646 ; *Higgins* v. *Willes*, (1828) 3 M. & R. 382 ; *Hopcraft* v. *Hickman*, (1824) 2 S. & S. 130.

The rule will not cover instances, like the award directing a house to be repaired to the satisfaction of a stranger : *Tomlin* v. *Fordwich Corporation*, (1836) 5 A. & E. 147, or an award directing that the amount of loss should be certified by a stranger : *Dresser* v. *Finnis*, (1855) 25 L. T. O. S. 81 ; but, on the other hand, an award directing that the defendant should pay for the iron machinery supplied to him by the plaintiff according to the present market price of pig-iron was held not to be uncertain, although the award omitted to state the time and market at which the price was to be ascertained : *Waddle* v. *Downman*, (1844) 12 M. & W. 562. With all respect to the learned Judges who decided the case it looks like unduly extending the scope of the principle—"*id certum est quod certum reddi potest*". Where the award directed "any expenses incurred by the Commissioners", it was held to be void for uncertainty : *Simpson* v. *Inland Revenue Commissioners*, (1914) 2 K. B. 842, but the direction "that the costs of the appellant incidental to this appeal be borne by

the Commissioners" was held to be valid: *Matthews* v. *Inland Revenue Commissioners*, (1914) 3 K. B. 192. The distinction was justified by Scrutton, J. by the following statement: "While I think that a referee, if he gives 'expenses', must settle the amount of those expenses, I am of opinion that he may, if he gives 'costs', make a valid award, although he does not fix the amount of the costs, and when his order as to costs has been made a rule of Court the Taxing Master of the Court will assess the amount of costs, not as a judicial but as a ministerial officer" (at p. 194).

"The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so" was the statement of the Judicial Committee in *Mukund Ram Sukal* v. *Salig Ram Sukal*, 21 Cal. 590 (at p. 600), which was a case where properties had been divided, but not the whole of them. Their Lordships added "they (the parties) might waive the condition that it shall do so" and "it was competent to the parties, when they were before the arbitrators, to agree to the division being made by steps, and that each division should be final" (at p. 600). The question whether, if some of the matters in controversy have not been decided, the award is void in its entirety was thus answered by Mookerjee, J. in *Ramji Ram* v. *Salig Ram*, 14 C. L. J. 188 at pp. 209, 210:

"No doubt, as laid down in *Whitworth* v. *Hulse*, (1866) L. R. 1 Ex. 251; *Randell* v. *Randell*, (1805) 7 East. 81; *Samuel* v. *Cooper*, (1835)

2 A. & E. 752 ; *Bradford* v. *Bryan*, (1741) Willes 268 and *Bowes* v. *Fernie*, (1838) 4 My. and Cr. 150, the arbitrator must be careful to see that his award is a final decision of all matters requiring his determination, and his failure to determine any of them may completely vitiate his award ; this would be specially the result where there is such a connection and interdependence between the various matters covered by the submission that the decision and disposition of some of them only to the exclusion of others, would operate to produce injustice between the parties. But it is equally well settled, as laid down in *Wrightson* v. *Bywater*, (1838) 3 M. & W. 199 and *Dowse* v. *Coxe*, (1825) 3 Bing. 20, that this principle has no application, if the submission can be construed to empower the arbitrator to make several awards. It is further well-settled that an award is none the less final, though it does not execute itself or preclude all future controversies ; if it leaves nothing to be done but the performance of some ministerial act, it is not faulty for want of such finality and certainty ; the principle applicable would be, *certum est quod certum reddi potest*, that is sufficiently certain which can be made certain : *Cargey* v. *Aitcheson*, (1823) 2 B. & C. 170".

It will be seen that in sec. 30(*c*) of the Arbitration Act, 1940, the language is "that an award has been improperly procured", whereas that in sec. 11(*2*) of the English Act of 1889 the words are "an arbitration or award has been improperly procured". The Indian statute makes no mention of an arbitration having been improperly procured. But there are no decisions under the

English Arbitration Acts of 1889 and 1934, which deal with arbitrations having been improperly procured or are confined to improper procuration of awards.

If improper procuration of arbitration means that the arbitration agreement is liable to be challenged as void or voidable, then by reason of sec. 33 of the Arbitration Act, 1940, the complaining party can "challenge the existence or validity of an arbitration agreement" by an *application* made under that section, which procedure is *mandatory* by reason of sec. 32, which prohibits the institution of any *suit* for that purpose. It is submitted that arbitration has been used in the English statute in the sense of "arbitration proceedings", but this discussion is academic, inasmuch as the omission of arbitration in sec. 30 has not led to any difference between the English and the Indian law.

Interim Awards

Provision for interim award adopted from English Act 1934 in sec. 27 Indian Act 1940

Prior to the English Arbitration Act, 1934, the arbitrator or umpire had no power to make an *interim* award, unless expressly authorised to do so, and the provision of the English Arbitration Act, 1934, has also been adopted in the Indian Arbitration Act, 1940, sec. 27 whereof runs as follows :—

"27. (*1*) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(*2*) All references in this Act to an award shall include references to an interim award made under sub-section (*1*)."

Before the introduction of this statutory provision there had been an important decision of the House of Lords in connection with successive rather than interim awards in the following circumstances :—

A case of successive award.

In a contract between a buyer and a seller there was a clause for referring all disputes arising out of or in relation to the contract to arbitration. Disputes having arisen the arbitrators awarded that the seller was in default and fixed default prices. The seller refused to pay the amount found due on the basis of the award. The matter was again referred to arbitration and the second award fixed the amount due from the seller. It was contended that this award was bad on ground urged by Sir John Simon, which will appear from extracts of the judgment of the House of Lords upholding the award :—

"Sir John Simon pointed out the danger of allowing arbitrations upon arbitrations, and so *ad infinitum*, each arbitration being upon the validity of the previous award. The answer to this ingenious but unconvincing argument is that when an award assumes a shape which makes it available for a judgment enforcing it in a Court of law, the process of infinitesimal repetition is at once arrested", and "I should feel no hesitation in saying that the arbitration clause is wide enough to cover a difference of this kind. I think the first award would, after litigation, have proved watertight, but I do not think it can be said that there was no difference to arbitrate upon when there was in fact a plausible case, which some might think a well-founded case, for defeating the action on the

award by reason of defects in form. In every difference one party is in the right and the other is in the wrong, and it is only when there has been an effective adjudication that the right to arbitrate under a clause like this ceases to exist." *Chandanmull* v. *Donald Campbell*, 23 C. W. N. 707 at pp. 712, 713 (*notes*). "Successive awards" discussed in the above case were not interlocutory or interim awards. Such awards may be necessary in connection with acts to be done or goods to be delivered in several instalments.

A case of delivery of goods in instalments will be found in *Balmukund* v. *Gopiram*, 24 C. W. N. 775, in which the Court held that the arbitration clause had not become exhausted by reason of the award having been made in respect of the dispute relating to one of the instalments.

LECTURE VIII

SUITS IN CONNECTION WITH ARBITRATION

Procedure for Setting Aside Award

Arbitration Act 1940 affects old statutes for setting aside award.

The Arbitration Act, 1940, affects the authorities which, under the older statutes, held that application under the Arbitration Act, 1899, or the Civil Procedure Code, 1908, Second Schedule, was not the only way for setting aside an award.

In 50 Cal. 1 Privy Council overruled objection that suit did not lie for setting aside award.

In *Sassoon & Co.* v. *Ramdutt Ramkissen*, 50 Cal. 1, it was contended that a suit did not lie for setting aside an award. Their Lordships of the Privy Council disposed of that objection by stating :—"On the argument before their Lordships, it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under section 14 of the Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award ; but where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose" (at p. 9).

So where an award was challenged on the ground that there was no submission to arbitration by the parties, it was held by the

Calcutta High Court that the remedy lay in a regular suit and not in an application under sec. 14 of the Indian Arbitration Act of 1899 : *Matulal* v. *Ramkissendas*, 47 Cal. 806. This decision was followed by the Lahore High Court in *Jai Narain* v. *Narain Das*, 3 Lah. 296. The same learned Judges, who decided *Matulal* v. *Ramkissendas*, have held in *Radha Kissen Khettry* v. *Lukhmi Chand Jhawar*, 24 C. W. N. 454, that where the ground on which an award is attacked goes to the root of the dispute and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy. They expressly refrained from deciding whether a suit would lie for setting aside an award on a ground covered by sec. 14 of the Indian Arbitration Act of 1899, but they were apparently of the view that even in such a case there was no statutory bar to the institution of a suit.

Remedy lay in regular suit when award challenged that there was no submission to arbitration.

Most of those authorities are of academic interest now by reason of the two sections of the Arbitration Act, 1940, set out below, namely :

Those authorities of academic interest now by reason of secs. 32 and 33 in Act 1940.

"32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

"33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbi-

tration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

Grounds in Answer to Application for Setting Aside Award.

The main grounds are set out below :—

Main grounds in answer to application for setting aside of award.

(*1*) Acquiescence in irregularities :—This matter will be dealt with later under the caption "Waiver and Acquiescence".

(*2*) Agreement not to impeach award :—An agreement not to impeach an award even on the ground of fraud is not opposed to public policy : *Tullis* v. *Jackson*, (1892) 3 Ch. 441.

Indian decision on all fours with *Tullis* v. *Jackson*.

There are some Indian decisions which are not on all fours with *Tullis* v. *Jackson*, for example, *Burla Ranga Reddi* v. *Kalapalli Sithaya*, 6 Mad. 368, in which the Court held that an agreement to the effect, that the decision of the arbitrator would be accepted as final and that no appeal therefrom should be made by either party, was illegal by reason of sec. 28 of the Indian Contract Act.

Scrutton, L. J.'s illuminating criticism of *Tullis* v. *Jackson* in (1922) 2 K. B. 478.

Tullis and Jackson, which was the judgment of a single Judge, was criticized by Scrutton, L. J. in *Czarnikow* v. *Roth, Schmidt and Co.* (1922) 2 K. B. 478 thus :—"It seems quite clear that no British Court would recognize or

enforce an agreement of British citizens not to raise a defence of illegality by British law. But for the decision of *Tullis* v. *Jackson*, (1892) 3 Ch. 441, I should have thought it equally clear that no agreement not to raise a defence of fraud was enforceable. Fraud usually involves a criminal offence, and if there were in fact fraud an agreement not to bring it before King's Courts was, I should have thought, clearly contrary to public policy. I reserve my right to consider *Tullis* v. *Jackson* if a similar clause should come before me" (at p. 488).

Obiter dictum of Fletcher, J. in 13 C. W. N. 63.

There is an *obiter dictum* of Fletcher, J. in *Hurdwary* v. *Ahmed*, 13 C. W. N. 63, to the effect that an agreement that no award was to be set aside except for collusion on the part of the arbitrators and that it was not competent for the parties to oust jurisdiction of the Court to set aside an award under sec. 14 of the Arbitration Act.

Statement of law in Halsbury's Laws of England.

The law, as stated in *Halsbury's Laws of England*, 2d Ed., Vol. I, supported by the authorities quoted in the foot-notes at p. 681 is :— "The parties may if they please waive any objection as to the misconduct of the arbitrator or umpire ; but the waiver must be made with full knowledge of the circumstances ; and it would seem that the parties may by their submission agree that neither of them will attempt to set aside the award on the ground of misconduct by the arbitrator." It may be said that this statement is misleading, if "misconduct" includes bribery, fraud, illegality etc. In this state of the authorities, it is submitted, that in India the decision in *Ranga Reddi* v. *Sithaya*, 6

Mad. 368, should still be considered good law, and in any case the Court will not have its jurisdiction ousted by an agreement not to challenge an award where fraud is in fact proved.

Taking benefit under award and performance of award.

(3) Taking benefit under the award and performance of the award :—

Motion for setting aside an award may be met by showing that the party moving has accepted benefit under the award with full knowledge of all relevant circumstances.

The parties to an award in a boundary dispute asked the Settlement Officer to lay pillars along the lines settled by the arbitrators. This was held to amount to acceptance of the award : *Ramrunjun* v. *Ramprosad*, 13 C. L. R. 26. An award decided the value of crops to which the plaintiff had objection, as according to him the valuation was too low. The plaintiff received a cheque for half the amount awarded and a promissory-note for the other half. He signed a receipt for the payment adding the words "under protest". His application for setting aside the award was rejected on the ground of delay and by reason of his act which amounted to acquiescence in the award by receiving benefit under it : *Parrott* v. *Shellard*, (1868) 16 W. R. 928. A party having accepted costs given to him by an award was not permitted to have the award set aside by reason of his acquiescence : *Kennard* v. *Harris*, (1824) 2 B. & C. 801.

If an award is made, some part of which is bad as being in excess of jurisdiction of the arbitrators, and assuming that the award is

liable to be set aside, yet if the complaining party has accepted benefits under it, he will not be allowed to challenge the award. In such circumstances it was said—"he", i. e. the party challenging the award "has chosen to accept and act upon it as if it were a good and binding award ; he has taken all the advantages it has given him and we cannot now allow him to say that he is not bound by it" : *Brijmohan Lal* v. *Shiam Singh*, 24 All. 164.

(*4*) That the irregularity complained of has resulted in benefit to the party moving to set aside the award :—The law bearing on this subject has been elaborately discussed by Mookerjee, J. in *Narsingh Narayan Singh* v. *Ajodhya Prosad Singh*, 16 C. W. N. 256, thus :— "It has been argued that if the arbitrator has exceeded his authority, he has done so for the benefit of the Defendants and they at any rate are not entitled to assail the award which is really in their favour. In our opinion this contention is well founded and must prevail. It is an elementary principle that only the party prejudiced by the exercise of excessive authority by the arbitrator is entitled to object to the award by reason of it ; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award of this ground." In support of his statement the learned Judge relied on *In re Bradshaw*, (1846) 12 Q. B. 562 : *Moore* v. *Butlin*, (1837) 7 A. & E. 595 ; *Taylor* v. *Shuttleworth*, (1840) 6 Bing. N. C. 277 ; *Syman* v. *Arnus*, (1827) 5 Pickering 213, (see also *Mercer* v. *Reid*, (1931) 47 T. L. R. 574 in this connection).

Law on subject elaborately discussed by Mookerjee, J. in 16 C.W.N. 256.

Defendant not prejudiced by arbitrator's omission incompetent to have award set aside.

Where the arbitrator after finding in favour of the plaintiff omitted to give him any damages, the defendant not having been prejudiced by such omission or want of finality was held to be incompetent for applying to have the award set aside : *Cox* v. *Kerslake*, (1867) 16 L. T. 396.

The position of a party performing what he is directed to do by the award in connection with his right to challenge the award is thus stated in *Russell on Arbitration and Award*, 13th Ed., p. 232 :—"It is very questionable whether a party by performing an award so acquiesces in it that he will be precluded from moving subsequently to have it set aside for irregularity. In *Goodman* v. *Sayers*, (1820) 2 J. & W. 249, it was held that a party was precluded from asking that an award should be set aside by reason of his having voluntarily paid to the other party a sum declared to be due by the award, but this was treated on the facts as in the nature of a compromise, while in *Bartle* v. *Musgrave*, (1841) 1 Dowl. (N. S.) 325, Patteson, J. said that such a payment did not appear to him to preclude a party from subsequently moving to have an award set aside."

Russell's view on point.

It is submitted a party may perform the directions on him set forth in the award in such a manner and to such extent that he may be precluded from challenging the award.

Time within which award to be set aside.

(5) Limitation :—The only provision appearing in the Limitation Act of 1908 (before its amendment by the Arbitration Act, 1940) was Art. 158—"Under the Code of Civil Procedure, 1908, to set aside an award—ten days—from the time when the award is filed in Court and

notice of the filing has been given to the parties."

Award not made within time allowed invalid.

As already stated under the Civil Procedure Code of 1882, an award not made within the period allowed by Court was invalid : *Raja Hara Narain Singh* v. *Chaudhrain Bhagwant Kuar*, 18 I. A. 55 P. C.

Voidable award set aside under C.P.C. 1908.

Under the Civil Procedure Code of 1908, it has been held that the award being voidable only requires to be set aside : *Kahan Singh* v. *Mohan Lal*, 34 I. C. 177 ; *Patto Kumari* v. *Upendra Nath*, 4 Pat. L. J. 265.

Award altogether illegal need not be set aside : 29 Cal. 36 and 8 All. 64.

It has also been held that an award which is altogether illegal, as, for example, as being signed by one of the two arbitrators and an umpire not legally appointed, need not be set aside and the Article in question will have no application : *Ram Narain* v. *Baij Nath*, 29 Cal. 36 ; *Muhammad Abid* v. *Muhammad Asghar*, 8 All. 64.

No limitation prescribed for remitting award for reconsideration.

Further there was no period of limitation prescribed for remitting an award for reconsideration, and the Article will apply only when the application is for wholly setting aside the award : *Starling's Limitation*, p. 454.

Old authorities on limitation now useless for latest modification.

Those authorities are now of little interest, as the Arbitration Act, 1940, provides for the following amendment :

"The Indian Limitation Act, 1908.	In the first Schedule for Art. 158 the following shall be substituted, *viz.* "158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration."	Thirty days.	"The date of service of the notice of filing of the award."

Some miscellaneous matters connected with the setting aside of awards :—

Whether arbitrator can be witness formulated in 36 All. 336.

(*1*) *Arbitrator as witness* :—In an application (or in an action where action was permissible) is it permissible to call the arbitrator as witness and is he bound to give evidence if required to do so ? The law on the point is this formulated by the Judicial Committee in *Amir Begam* v. *Badr ud-din Husain*, 36 All. 336, is :—"An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different purpose ; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case : *Buccleuch* v. *Metropolitan Board of Works*, (1872) L. R. 5 H. L. 418, but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established" (at p. 344).

Limitations in *Buccleuch's* case referred to above.

The limitations in *Buccleuch's* case referred to above are :—The arbitrator can be examined on all facts with reference to his making the award, what claims were made and what admitted, so as to put the Court in possession of the history of the litigation up to the time of

his proceeding to make the award, and whether in his estimate of the compensation, he took into consideration any matters not included in the reference, and, therefore, not within his jurisdiction ; but the party had no right to go further and to question the arbitrator as to the elements he took into consideration in determining the quantum of compensation, or to scrutinise the exercise by the arbitrator of his discretionary power to award compensation.

Limitation applicable to examination-in-chief and not to cross-examination. Lord Reading's remarks on point in (1915) 3 K.B. 277.

In spite of the limitation laid down in *Buccleuch's* case that there was "no right to question the arbitrator as to the elements he took into his consideration", such questions have been permitted, and *Buccleuch's* case was distinguished on the ground that the limitation was applicable to examination-in-chief and not to cross-examination. Lord Reading, C. J. remarked thus on the point : "It must be borne in mind that the evidence under discussion in the *Duke of Buccleuch's* case L. R. 5 H. L. 418 was evidence in chief, to which very different considerations apply. The House of Lords did no doubt limit materially the questions which could be put in examination in chief to an arbitrator ; but, when evidence has been given in chief, the cross-examination of the witness, so long as it is directed to a relevent issue, cannot be limited in the way contended for, nor is there anything in the *Duke of Buccleuch's* case which does so limit it. We therefore think that in this case it was permissible to cross-examine the auditor in order to show that he had taken into account reduction in turnover etc." : *Recher and Co.* v. *North*

British and Mercantile Insurance Co., (1915) 3 K. B. 277.

Other authorities referred to on point in *Russell on Arbitration and Award.*

Older authorities are referred to in *Russell on Arbitration and Award*, 13th Ed., p. 252, where the learned author also cites the statement of Mansfield, C. J. about the arbitrator being called as a witness that "he need not be examined unless he chose" ; but the law as laid down in these cases must be regarded as overruled both by the Judicial Committee and the House of Lords in the cases already referred to : (See also *Bourgeois* v. *Weddell*, (1924) 1 K. B. 539, where a party was allowed to examine the arbitrator appointed by him, although he had also acted as an expert in the matter before the umpire as it was held a commercial arbitration. While the arbitrator is bound to give evidence if required to do so, the Courts do not encourage any general practice of calling arbitrators as witnessess. Besides the Indian Evidence Act does not apply to arbitrations. So the arbitrator is not bound to follow the provisions of the Indian Evidence Act : *Kaikobad* v. *Khambatta*, 1930 A. I. R. Lah. 280. In *Hugger* v. *Baker*, (1845) 14 M. & W. 9, the Court did not review the decision of an arbitrator, who intending to decide rightly came to wrong conclusion as to the admissibility of documentary or oral evidence or relevancy of particular facts.

In allowing an application for calling two arbitrators as witnesses, Humphreys, J. said in *Leiserach* v. *Schalit*, (1934) 2 K. B. 353 :—"In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in

which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from a perusal of the affidavits on one side and the other—namely, what are the essential facts of the case. On that ground and on that ground only the Court accedes to the application to call as witnesses both the gentlemen who acted as arbitrators on the matter."

(2) *Affidavits by Arbitrators* :—There are many authorities supporting the position that in applications for setting aside awards or in resisting such applications, arbitrators can swear affidavits for showing how proceedings were conducted and in what manner the award was executed for explaining alleged irregularities or for meeting charges of misconduct *In re Hare and Milne*, (1839) 8 Dowl. 71 ; *In re Hall and Hinds*, (1841) 2 M. & G. 847 ; *Blundell* v. *Brettargh*, (1810) 17 Ves. 232. In *In re Enoch and Zaretzky, Bock and Co.*, (1910) 1 K. B. 327, an affidavit filed by an arbitrator in proceedings for setting aside his award was allowed to be relied on for showing bias on his part. As must naturally be the case an arbitrator cannot be allowed to swear an affidavit for explaining his real intention when the language of the award is free from ambiguity : *Gordon* v. *Mitchell*, (1819) 3 Moore 241.

Affidavits by arbitrators.

But where the arbitrator has not been examined as a witness nor has he put in an affidavit, the Court refused to set aside an award on evidence given by others that the arbitrator had made statements admitting that he had been bribed : *In re Whiteley and Roberts*, (1891)

1 Ch. 558. The correctness of this judgment may be doubted if it is intended to lay down that for proving acceptance of bribes the arbitrator must be called as a witness. There is no reason for holding that the acceptance of bribe cannot be proved by reliable evidence without making an attempt to get the arbitrator to admit that he had been bribed.

(3) *Who may move to set aside on Award* :—

Who may move to set aside award.

Such right is inherent in the parties to the award, but rights of others have also to be considered. It has been taken as unquestionable that where the assignee of a bankrupt had interest in the award he could apply for having it set aside : *Tayler* v. *Marling*, (1840) 10 L. J. C. P. 26 ; *Hobbs* v. *Ferrars*, (1840) 8 Dowl. 779. As regards executors or administrators, it is stated in *Russell on Arbitration and Award*, 13th Ed., p. 218—"The executors or administrators of a deceased party being at liberty to enforce it (the award), and liable to its burdens as far as they have assets, have a right to apply to set it aside. The correctness of this statement is not doubted although none of the four authorities referred to by the learned author bears it out. A party in whose favour arbitrators have made a mistake cannot apply to have the award set aside : *Moore* v. *Butlin*, (1837) 7 A. & E. 595 ; *Cox* v. *Kerslake* (1867) 16 L. T. 396, a matter which has been discussed in connection with mistakes made by arbitrators.

Waiver and Acquiescence

Waiver and Acquiescence.

This topic has appeared from time to time indirectly in previous discussions, but it is pro-

posed to deal now with the principle and scope of the doctrine. The underlying principle was thus enunciated by the Judicial Committee in *Chowdhri Murtaza Hossein* v. *Mussumat Bibi Bechunissa*, 3 I. A. 209 at p. 220: "On the whole, therefore, their Lordships think that the Appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

Clear knowledge of circumstances essential ingredient.

The "clear knowledge of the circumstances" is an essential ingredient 'as waiver must be an intentional act with knowledge': *Darnley* (*Earl*) v. *London, Chatham and Dover Rail Co.*, (1865) L. R. 2 H. L. 43 at p. 57.

Cases of waiver of irregularities.

On the principle indicated above the parties have been deemed to waive irregularities, like, giving of six days' notice in writing: *Kingwell* v. *Elliott*, (1839) 7 Dowl. 423; examining a party as witness who ought to have been excluded by cross-examining him after protest: *Smith* v. *Sparrow*, (1847) 4 D. & L. 604; *ex parte* examination of a witness: *Bignall* v. *Gale*, (1841) 2 M. & G. 830; *Dobson* v. *Groves*, (1844) 6 Q. B. 637; interview with a party in the absence of others: *Hamilton* v. *Bankin*, (1850) 19 L. J. Ch. 307; communication during arbitration with the agent of one of the parties: *Mills* v. *Bowyer's Society*, (1856) 3

K. & J. 66; *Peterson* v. *Ayre*, (1854) 14 C. B. 665; *Hallett* v. *Hallett*, (1839) 7 Dowl. 389; examination of a witness in the absence of both parties: *Hewlett* v. *Laycock*, (1827) 2 C. & P. 574; examination of a witness without oath; *Wakefield* v. *Llanelly Rail Co.*, (1865) 34 Beav. 245; *Thomas* v. *Torris*, (1867) 16 L. T. 398; objection on the ground that one of the arbitrators had acted as an advocate for a party: *Biglin* v. *Clark*, (1905) 49 Sol. L. J. 204; objection on the ground that the time for making the award had expired: *Laksminarasimham* v. *Somasamundaram*, 15 Mad. 384; *Hallett* v. *Hallett*, (1839) 7 Dowl. 389; *Bennett* v. *Watson*, (1869) 29 L. J. Ex. 357; failure to obtain consent of the Court by the assignee of a bankrupt for arbitration in a claim: *Ex parte Wyld*, (1860) 30 L. J. Bk. 10; irregular appointment of an umpire: *In re Tunno and Bird*, (1833) 5 B. & Ad. 488; *In re Hick*, (1819) 8 Taunt. 694; acceptance of secondary evidence of the contents of a document: *Robinson* v. *Davies*, (1879) 49 L. J. Q. B. 218. Rather an extreme case is *Watson* v. *Trower*, (1824) 1 Ry. & Moo. 17, where the umpire's award was upheld though the arbitrators had no power to appoint an umpire.

Plea of waiver or acquiescence requires proof.

It is apparent that if a party relies on the plea of waiver or acquiescence, he takes upon himself the onus of proving it: *Rolland* v. *Cassidy*, (1888) 13 A. C. 770 at p. 778. Where parties have agreed that there will be no right of action until differences have been decided upon by the arbitrator, a party by not insisting on arbitration may waive his right to have the arbi-

tration : *Toronto Rail Co.* v. *National Insurance Co.*, (1914) 20 Com. Cas. 1.

Sometimes the attempt to get rid of an arbitrator, who is not likely to have an open mind, fails on the ground of waiver, if the party knew at the time of the submission that the arbitrator was likely to be so ; for example, when the arbitrator was the engineer of the building owner and the parties had agreed that he should adjudicate upon disputes between his employer and a contractor : *Jackson* v. *Barry Rail Co.*, (1893) 1 Ch. 238.

Can there be a waiver of the ground that one of the parties was legally incompetent of submitting matters to arbitration ?

Law on point as laid down by Russell.

The law as laid down on the point in *Russell on Arbitration and Award*, 13th Ed., p. 212 is : "If one of the parties is incapable, the objection should be taken to the submission. A party will not be permitted to lie by and join in the submission, and then, if it suits his purpose, attack the award on that ground. The presumption, in the absence of proof to the contrary, will be that the party complaining was aware of the disability when the submission was made : *Wrightson* v. *Bywater*, (1838) 3 M. & W. 199 ; *Jones* v. *Powell*, (1838) 6 Dowl. 483 ; *Ex parte Wylde*, 30 L. J. Bk. 10 ; *In re Warner*, (1844) 2 D. & L. 148.

Arbitration agreement between adult and minor has different results in India.

In India a contract by a minor is void and not merely voidable. An arbitration agreement between *A* an adult and *B* a minor stands on a very different footing here from its position in England.

In Soudamini Ghose v. *Gopal Chandra Ghose*, 21 C. L. J. 273, Mookerjee, J., after

Capacity to make submission co-extensive with capacity to contract as *per* Mookerjee, J. in 21 C. L. J. 273.

coming to the conclusion that the executors could not in the circumstances of the case refer matters to arbitration stated: "Capacity to make a submission is co-extensive with capacity to contract." There the executrix, who was a party to the submission, herself raised the objection that she could not refer matters to arbitration, but his Lordship held that this incapacity was an error apparent on the face of the award, and, therefore, the award could not be filed. With great respect to his Lordship, it is submitted that he did not tackle the question whether the executrix could herself take the objection, having been a party to the submission and lying quiet while the proceedings were going on culminating in the award. None of the English authorities were cited, and it may be doubted whether the decision is correct. The agreement of an executor is distinguishable from that of a minor. Of course, if the enforcement of the award affects the rights of any party who had not signed the submission, it would be open to him to challenge the legality of the award.

Waiver to be effective must be act intended and done with full knowledge of necessary facts.

Indian authorities laying down the proposition already stated, namely, that a waiver to be effective must be an act intended and done with full knowledge of all necessary facts, are quite numerous: *Manindra* v. *Mahananda*, 15 C.L.J. 360; *Saturjet* v. *Dulhin*, 24 Cal. 469; *Chatturbhuj* v. *Deokaran*, 26 Bom. L. R. 84; *Unniraman* v. *Chattan*, 9 Mad. 451; *Nadir Chand* v. *Gobinda*, 2 C. L. J. 61. Lord Justice Turner put the matter very clearly in *Haigh* v. *Haigh*, (1862) 31 L. J. Ch. 420 at p. 424 in these words:—"But the irregularities to which these objections apply

were of such a description, and calculated so seriously to prejudice Mr. G. A. Haigh, and it is so clear upon the evidence that what he afterwards did was done by him under the compulsion of the irregularities, and without any intention to waive his objection, that, with every disposition to support these awards, I think it would be going too far to hold that he was bound by waiver." Similarly in the case of *Mills* v. *Bowyer's Society*, (1856) 3 K. & J. 66, referred to previously, it was said :—"It would be a great deal too dangerous to allow any arbitrator, or any umpire, to have communication with some of the parties without the knowledge of other parties to the reference, and then to say that he was not influenced by anything which took place. But in this case it appears that the only thing which took place was one which every person knew of at the time, and they allowed the reference to proceed without making any objection." And in *Thomas* v. *Morris*, (1867) 16 L. T. 398, also cited above, it was stated by the Court that the applicant having with knowledge of what had been done relied on the probity of the arbitrator before the award was made, it was too late for him to complain after he found that the award was against him.

Continuing to attend proceedings with knowledge of irregularities committed without objection will ordinarily amount to waiver. A party knowing that witnesses had been examined in his absence never made any objection, nor did he require the witnesses to be examined later in his presence. The Court was inclined on the facts to take the view that it amounted to waiver, but

Continuing to attend proceedings with knowledge of irregularities amounts to waiver.

it was found unnecessary to decide this question : *Bignall* v. *Gale*, (1841) 10 L. J. C. P. 169 and other authorities previously referred to.

Instances of waiver often appear in decided cases, and the kind of irregularity which may be waived by continuing to take part in the arbitration proceedings with full knowledge of the irregularity is illustrated by the decisions already referred to, and other instances will be found from other reported decisions.

Extreme case of waiver exemplified in 58 Cal. 269.

An extreme case of waiver will be found in *Brajendra Kumar Pal* v. *Purna Chandra Pal*, 58 Cal. 269, where two of the three arbitrators were examined as witnesses in the course of the proceedings. The Court refused to set aside the award on the ground that their names had appeared in the lists of witnesses when the suit was pending in Court, and therefore, the parties knew and contemplated that they might be examined as witnesses. It will be noticed that in the words of Lord Atkinson in *Bristol Corporation* v. *John Aird and Co.*, (1913) A. C. 241 :—"If he (the arbitrator) be really a witness, then he must, in effect, be examined before himself, and cross-examined before himself, and he must decide upon his veracity and reliability" (at p. 248).

Situation not so bad as in 58 Cal. 269 was (1922) 1 K. B. 640.

In a case where the situation was not so indescribably bad as in *Brojendra Kumar Pal* v. *Purna Chandra Pal* in 58 Cal. 269, it was said by Bray, J. :—"It is stated on behalf of the sellers that no injustice was done...etc. I feel the force of that, but Mr. Goddard has urged for the buyer that we ought to show our disapproval of the procedure that was followed, and, with some reluctance, I yield to that argument and say

that we ought to set the award aside" : *Ramsden* v. *Jacobs*, (1922) 1 K. B. 640. In *Ramsden's* case no objection was made to the procedure adopted by the arbitrator of hearing the evidence of each of the parties in the absence of the other, and it is submitted that, in 58 Cal. 269 referred to, their Lordships should have unhesitatingly set aside the award instead of condoning an intolerably illegal situation on the principle of waiver.

Russell's view on where party does not acquiesce in irregularity.

Where a party does not want to acquiesce in any irregularity, what should he do ? The law is thus very clearly summarized in *Russell on Arbitration and Award*, 13th. Ed., p. 385 :— "The strongest line of conduct and the strongest form of protest for a party to adopt or make is to retire from the proceedings, but such a course, when a party is brought before or tied to a particular tribunal, is obviously extremely dangerous, because he may ultimately find, when he has moved to set aside the award made against him, that the irregularity of which he complains is not sufficient to upset the award."

"The obvious course, therefore, is for a party complaining of irregularity to protest against the irregularity, and to continue to conduct his case in the proceedings before the arbitrator under such protest."

"The other alternative is to submit to the irregularity, and forego any rights he may have to object to the award on that ground when it is made, for he cannot lie by and then object to the award if it is against him."

The learned author is quite right in drawing attention to the danger of a party withdrawing

from the arbitration as soon as he finds that some irregularity has been committed.

Lord Esher's observation in (1894) 1 Q.B. 107 worth considering.

In this connection it would be well to remember what was said by Lord Esher, M. R. in *Bache* v. *Billingham*, (1894) 1 Q. B. 107 :—"They (the arbitrators) heard him (one of the parties), but then they examined witnesses against him when he was not present, and did not give him the opportunity of cross-examining those witnesses. That is a wrong procedure in the arbitration ; but nevertheless they did that to come to a decision, and they came to a decision... That does not make the decision void. It only gives ground for a Court to set it aside or for an appeal" (at p. 110).

Court may take stricter view of irregularity than party withdrawing.

A party may find in attempting to set aside the award that the Court takes a much stricter view of the irregularity than that taken by him when he decided to withdraw from the arbitration.

Party protesting may attend proceedings after protest.

There are numerous authorities for the proposition which is free from doubt, namely, where a protest is made, the party protesting is not bound to retire and may attend throughout the proceedings after protest : *Chetandas* v. *Radhakisson*, 29 Bom. L. R. 1087 : *Sheonath* v. *Ramnath*, (1865) 35 L. J. P. C. 1 ; *Hamlyn* v. *Betteley*, (1880) 6 Q. B. D. 63 ; *Blisset* v. *Tenant*, (1828) 7 L. J. C. P. 108 ; *Davies* v. *Price*, (1864) 34 L. J. Q. B. 8 ; *Holt* v. *Meddowcroft*, (1846) 4 M. & S. 467 ; *Ringland* v. *Lowndes*, (1864) 33 L. J. C. P. 337.

Throughout so far the expression used has been "waiver of irregularity" where there is an

excess of jurisdiction, like, considering matters not referred to the arbitrator, and in such a case if a party continues to attend proceedings after protest, he does not give authority to the arbitrator to decide such matter: *Ringland* v. *Lowndes*, (1864) 33 L. J. C. P. 337.

'Waiver of irregularity, used for excess of jurisdiction.

The protest may be too late, for instance, where the reference was to three arbitrators, and the proceedings were before two arbitrators, all parties apparently considering the third arbitrator as umpire, one of the parties made his protest on the day the award was made. It was held to be too late: *In re Marsh*, (1847) 16 L. J. Q. B. 330.

Where protest held to be too late.

A party protesting should make it perfectly clear what he was objecting to: *In re Morphett*, (1845) 14 L. J. Q. B. 259, a party objected to the award on the ground that he had no notice of two of the meetings. At the first meeting the arbitrators merely adjourned and at the second meeting the party delivered a formal protest different from that of want of notice. It was held that he was not entitled to notice of the first meeting and that he had by his protest waived the want of notice of the second meeting.

If a party protests against any particular form of irregularity, he should not, if he wanted to secure the benefit of such irregularity, himself be guilty of the same kind of irregularity.

Protesting party not to be guilty himself.

Where the order of reference required witnesses to be sworn, the arbitrator examined plaintiff's witnesses but not upon oath. The defendant protested against such a procedure,

but allowed his witnesses to be similarly examined. It was held that he had waived the objection and that could not challenge the award on that ground; *Allen* v. *Francis*, (1845) 9 Jur. 691.

Awards remitted when arbitrator guilty of legal or judicial misconduct.

It has already been said that the topic of setting aside awards, though subject-matter of sec. 30 of Arbitration Act, 1940, was being taken immediately after sec. 16 dealing with power to remit awards. This is quite appropriate because the power to remit is not infrequently used in dealing with applications for setting aside awards: *Howett* v. *Clements*, (1845) 1 C. B. 128; *Anning* v. *Hartley*, (1858) 27 L. J. Ex. 145 and this practice has been followed in India.

Where the arbitrator has been guilty of what is called legal or judicial misconduct and has not behaved in such a way that the Court doubts his honesty or impartiality. The awards have been remitted when applications have been made not for remitting the awards but for setting them aside: *Davenport* v. *Vickery*, (1861) 9 W. R. 701: *Hari Singh* v. *Kankinarah Co. Ltd.*, 34 C. L. J. 39; *In re Crompton and Co. Ld.*, 41 Cal. 313.

Courts not to rescind proceedings where arbitrator not partial, dishonest or corrupt.

Courts are and ought to be reluctant to have proceedings already heard before the arbitrator and the trouble and costs involved in such proceedings to be thrown away, where the arbitrator has not behaved with partiality, or in a dishonest manner, or is suspected to be corrupt, and this is avoided by remitting the award instead of setting it aside.

LECTURE IX

JUDGMENT ON AWARD

Taking up the scheme of the Arbitration Act, 1940, the next matter is *Judgment in terms of Award*, which is the subject-matter of sec. 17 which runs as follows :—

Judgment in terms of award treated in sec. 17.

"17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

Sec. 17 removes difference existing in Act 1899 and C. P. C. 1908.

This section removes the difference which existed in the situations under the Indian Arbitration Act, 1899, and the second schedule of the Civil Procedure Code, 1908.

Under sec. 15 Act 1899 award had force of decree.

Under sec. 15 of the Indian Arbitration Act, 1899, an award on being duly filed "shall be enforceable as if it were a decree of the Court." The words 'as if' show that it is not a decree but has the enforceability of a decree. This

matter has been incidentally mentioned previously.

Consequently where the committing of an act of insolvency requires property being sold or attached in execution of the decree of any Court for the payment of money, an award not being a decree will not be available for being the basis of an application for getting the debtor adjudged insolvent : *Ramsahai Mull* v. *Joylall*, 32 C. W. N. 608 ; *In re Bankruptcy Notice*, (1907) 1 K. B. 478.

Under para. 16 C. P. C. 1908 judgment to follow award to be followed by decree.

Under the Second Schedule of the Civil Procedure Code, 1908, by reason of para. 16, the Court is required to pronounce judgment according to the award and upon such judgment a decree follows.

Sec. 17 adopts scheme of C.P.C. 1908.

The present sec. 17 has adopted the scheme of the Civil Procedure Code, 1908, Second Schedule.

Sec. 14 requires notice to be given of filing of award.

Further under the Indian Arbitration Act, 1899, an award could be enforced even before the parties had been notified of the filing of the award, *Udaichand* v. *Debibux*, 47 Cal. 951. Sec. 14 of the Arbitration Act of 1940 makes it clear that notice of the filing of the award must be given to the parties before the judgment is pronounced.

Limitation for execution of decree differs according as judgment is of High Court or District Court.

The period of limitation for executing a decree will depend on whether the judgment is pronounced by a Chartered High Court, in which case Art. 183 will apply allowing a period of twelve years, whereas if filed in any other Court, the period of limitation will be three years, or where a certified copy of the decree or order has been registered, six years under Art. 182 of the Indian Limitation Act, 1908.

The judgment and decree on award represents the final stage, but the Indian Arbitration Act, 1940, has introduced a provision absent in the previous Indian statutes, namely, the power of the Court to pass *interim* orders, which may become necessary if a party to the award "has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award", or where such order becomes necessary for "speedy execution of the award". Such a provision is enacted by sec. 18 of the Arbitration Act, 1940.

Sec. 18 Arbitration Act, 1940 introduces for first time power to pass *interim* orders.

By reason of sec. 41 the Court has, for the purpose of and in relation to arbitration proceedings, the same power of making orders in respect of *interim* injunctions, appointments of receivers and other matters set out in the Second Schedule as it has for the purpose of and in relation to proceedings before the Court ; sec. 18 refers to a point of time when arbitration proceedings have ended in an award which has been filed.

Under sec. 41 Court can make orders for interim injunctions, appointment of receivers and other matters.

In Chapter II the last section, that is, sec. 19 deals with the power of the Court to supersede arbitration when the award becomes void or is set aside. Sec. 19 runs thus : "When an award has become void under sub-section (3) of section 16" on the arbitrator's failure to reconsider the remitted award "or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred."

Sec. 19 deals with supercession of arbitration when award becomes void or is voided.

There was no such provision in the Indian Arbitration Act, 1899, but in arbitration in suits governed by the Second Schedule, Civil Procedure

Such provision absent in Act 1899 but

existent in C. P. C. 1908 in para 15(2).

Code, 1908, para. 15(*2*) thereof provided : "Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration, and in such case shall proceed with the suit."

Chap. III deals with arbitration without intervention of Court where no suit pending.

The next Chapter of the Act, *i.e.* Chapter III deals with "*Arbitration with intervention of a Court where there is no suit pending*" and consists of one section only, namely, sec. 20. This section is practically the same as para. 17 of the Second Schedule of the Civil Procedure Code of 1908.

Sub-sec. (*1*) of sec. 20 is as follows :—

Provisions of sec. 20 set out.

"20. (*1*) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II", (*Arbitration without intervention of a Court*) "may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court."

Sub sec. (*2*) and (*3*) provide for registration and notice and sub-sec. (*4*) provides for Court ordering filing of agreement, making reference to arbitrator and appointing arbitrator in case of difference.

The next sub-secs. (*2*) and (*3*) provide for registration and giving of notice to parties, and sub-sec. (*4*) provides :—"Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court." The procedure laid down in this section is

no doubt unnecessary, but, on the other hand, questions, like those, of (i) whether there is a valid submission (ii) whether the agreement will apply to the differences which have arisen etc., are disposed of at the earliest stage in the presence of the parties, instead of the arbitration proceedings being allowed to continue resulting in an award and then the parties taking recourse to Court to have such matters decided.

Sec. 20 reproduces para. 17 C.P.C. 1908.

Inasmuch as sec. 20 of the Arbitration Act of 1940 substantially reproduces para. 17 of the Second Schedule of the Civil Procedure Code, 1908, many of the decisions under that paragraph are still good law. Para. 17 did not, by reason of sec. 3 of the Indian Arbitration Act, 1899, apply to cases, where if the subject-matter submitted to arbitration were the subject of a suit, such suit could be instituted with or without leave, in a High Court or in a Presidency town : *Kunthi Ammal* v. *Sarangapani Chetti*, 54 Mad. 198. But such a question cannot arise now by reason of the Indian Arbitration Act, 1899, having been repealed.

The agreement contemplated in sec. 20 of the Arbitration Act, 1940, must be a valid agreement entered into between parties competent to enter into the agreement, and the subject-matter must be such as can be validly referred to arbitration, not being forbidden by any law or being opposed to public policy : *Mohsinuddin* v. *Khabiruddin*, 26 C. W. N. 246 ; *Shankar* v. *Ramchandra*, 25 Bom. L. R. 437. An agreement not hit by any of the above considerations may be incapable of being filed in Court for having come to an end by either revocation or lapse of time : *Coley*

v. *DaCosta*, 17 Cal. 200 ; *Vishwas* v. *Bhalchandra*, 33 Bom. L. R. 1022.

When the application for filing the award comes to be heard, the agreement may be denied, in which case, according to *Bijadhur* v. *Manohar*, 10 Cal. 11, the parties should be referred to a suit. There is a decision to the contrary in *Sheo Prasad* v. *Indore Malwa United Mills Ltd.*, (1917) P. R. No. 62, but now by reason of sec. 32 of the Indian Arbitration Act, 1940, no party can bring a suit for establishing the existence, effect or validity of an arbitration agreement.

A change has been made by sub-sec. (*4*), inasmuch as under the Civil Procedure Code, Second Schedule, para. 17, the power of the Court to appoint an arbitrator was limited to "if there is no such provision" (provision in the agreement) "and the parties cannot agree." ; whereas under sec. 20, sub-sec. (*4*) of the Arbitration Act, 1940, the Court's power has been widened by the expression "where the parties cannot agree upon an arbitrator." After the filing "the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

Both para. 17 of the Second Schedule of Civil Procedure Code, 1908, and sub-sec. (*4*) of sec. 20 of Arbitration Act, 1940, use the words "where no sufficient cause is shown". These words have made no attempts to confine the grounds for the Court's refusal to have the agreement filed to fraud or undue influence. After the agreement is filed, if party dies, by reason of sec. 6 the arbitration does not terminate, and

the same conclusion was arrived at under the Civil Procedure Code, Second Schedule, in which there was no express enactment relating to the effect of death : *Hara Krishna* v. *Ram Gopal*, 14 C. W. N. 759. It was also held that after the agreement had been filed in Court, it could only be revoked by leave of the Court upon good cause being shown : *Perumalla* v. *Perumalla*, 27 Mad. 112 ; *Sheo Narain* v. *Bala Rao*, 30 A. L. J. 331. The "good cause" must, however, depend on facts on the existence of which the Court has power to supersede the arbitration. With reference to powers given by sec. 25 which relates to arbitration in suits, it is coupled with the direction that it shall "proceed with the suit", which is inapplicable to arbitration where no suit is pending. In such a case there being no suit to be proceeded with, it has been held under the Civil Procedure Code that the only order to be made is one superseding the arbitration : *Satish Chandra* v. *Paliram* : 61 I. C. 390. That position has not been altered by the Arbitration Act, 1940.

Court's disability to appoint arbitrator death taking place among the lot remedied by Act 1940.

The disability of the Court to appoint an arbitrator where one of three arbitrators has died (*cf. Narayanappa* v. *Ram Chandrappa*, 54 Mad. 469) has now been remedied by the Arbitration Act, 1940—a matter which has already been discussed.

The next Chapter, i. e. Chapter IV of the Arbitration Act, 1940, relates to "*Arbitration in Suits*" and its first three sections substantially re-enact paras. 1, 2 and 3 of the Second Schedule, Civil Procedure Code, 1908. The parties to a suit may apply at any time before judgment

for an order of reference to arbitration, and sec. 21 refers to application by all the parties interested, whereas sec. 24 refers to arbitration by some of the parties.

Provision for application removes difficulty of irreconcileable decisions.

The provision for application by some of the parties has removed the difficulty created by irreconcileable decisions of the several High Courts, the purport of some of which is set out below :—

Parties to apply in reference when issue in suit relates to difference.

(*1*) Where the issue in the suit relates to a difference between all the plaintiffs on the one hand and all the defendants on the other, all the parties must apply for an order of reference, otherwise the reference will be illegal and the award bad : *Girija Nath* v. *Kanai Lal* 27 C.L.J. 339 ; *Seth Dooly Chand* v. *Mamuji*, 25 C.L.J. 339 ; *Laduram* v. *Nandalal*, 47 Cal. 555 ; *Tej Singh* v. *Ghasiram*, 49 All. 812, and various other authorities to the same effect.

Party not appearing contesting no conclusive proof of his no interest in difference.

(*2*) The fact of a party not appearing in the suit and not contesting it is not conclusive on the question whether he is interested or not in the difference to arbitration : *Mahadev* v. *Narayan*, 52 Bom. 408 ; *Sharafat Ali* v. *Bhagwati*, 52 All. 84 ; *Girija Nath* v. *Kanai Lal*, 27 C. L. J. 339 ; *Bhagavanulu* v. *Seetharamaswami*, 44 M. L. J. 359.

Reference invalid when one partner agrees to arbitration without joining others.

Where the suit is against a firm and a partner appears for the firm and agrees to arbitration without making the other partners join it, the reference is invalid. *Seth Dooly Chand* v. *Mamuji*, 21 C. W. N. 387 ; *Gopaldas* v. *Baijanath*, 48 All. 239.

(*3*) Reference to arbitration at the instance of all parties except one, whose right not being

contested the suit is dismissed against him, is a valid reference : *Srimati Saroj Bala* v. *Jatindra Nath*, 45 C. L. J. 458 ; where in a redemption suit only the Official Assignee joins, and not the insolvent, the award is invalid : *Laduram* v. *Nandalal*, 47 Cal. 555.

Award not invalid when portion affecting parties not interested separable.

(*4*) Where all the parties have not joined and the contest is between some of the parties only, then, if the parties not joining are not interested parties, and the award, so far as it relates to them, is separable from other parts, the award will not be invalid : *Ishar Das* v. *Keshab Deo*, 32 All. 567.

Interesting case on point in 53 All. 669.

There is an interesting case reported in 53 All. 669, namely, that of *Bankey Lal* v. *Chotey Miyan*. There the liability of the two defendants to the plaintiff was joint and several. The reference to arbitration was at the instance of one of the defendants and the plaintiff exonerated the non-joining defendant in the Appellate Court. It was held that both the award and reference were valid.

The decisions referred to above are governed by para. 1 of the Second Schedule of the Civil Procedure Code, 1908, which corresponds to sec. 21 of the Arbitration Act, 1940.

The words "all the parties interested agree" of sec. 21 are also to be found in para. 1 of the Second Schedule of the Civil Procedure Code, 1908.

A party against whom no relief is claimed may still be an "interested party" as held in *Subbarao* v. *Appadurai* : 48 M. L. J. 142.

No useful purpose will be served by dis-

cussing the not easily reconcileable authorities which lay down that if the parties not joining are not "interested parties", and the part of the award affecting them is separable from the part affecting those that have joined, then effect will be given to the award. In addition to the two authorities referred to, namely, those of *Ishar Das* v. *Keshab Deo*, 32 All. 567 and *Bankey Lal* v. *Chotey Miyan*, 53 All. 669, some other authorities which are relevant to the matter are *Raghunath* v. *Ramrup*, 2 Pat. 777 and *Ajudhia Prasad* v. *Badar-ul-Husain*, 39 All. 489.

36 All. 354 upholds Court's inherent jurisdiction to supersede award.

Without deciding the matter it has been suggested in *Chatarbhuj* v. *Raghubar*, 36 All. 354, that Court may have inherent jurisdiction to supersede an arbitration. To say the least this seems to be extremely doubtful.

Court's inherent jurisdiction under sec. 151 C.P.C. discussed in 11 Lah. 342.

A propos of the inherent jurisdiction of the Court under sec. 151 of the Civil Procedure Code, 1908, attention is drawn to *Kaikabad* v. *Khambatta*, 11 Lah. 342, which negatived such a power in connection with the correction of an award on a ground not covered by para. 12 of the Second Schedule of the Civil Procedure Code, 1908.

Sec. 21 lays down the procedure for reference to arbitration in a pending suit, which makes it necessary to have the Court's sanction, but it often happens that parties to a pending suit agree to refer the subject-matter of the suit to arbitration without an order of the Court. In such a case if there has been no award, the agreement does not amount to an adjustment or compromise of suit as contemplated in the Civil Procedure Code : *Tincowrey* v. *Fakir Chand*, 30

Cal. 218, *Vyankatesh* v. *Ramchandra*, 38 Bom. 687 ; *Khobhari* v. *Jhaman*, 23 C.L.J. 482.

If the arbitration proceedings have ended in an award, does the agreement *plus* the award amount to an adjustment of the suit ? The authorities on this matter are quite conflicting.

Bombay High Court settles point in 51 Bom. 908.

After many conflicting decisions the Bombay High Court settled the point in its Full Bench decision in *Chanbasappa* v. *Basalingayya*, 51 Bom. 908, holding that where there was a reference to arbitration in a pending suit without the order of the Court and an award had been made, the Court could pass a decree in terms of the award under Or. 23 r. 3 of the Civil Procedure Code, 1908, and the same Court has also decided that when an award is put forward in such circumstances as operating to adjust the suit, the Court has jurisdiction to consider whether the award is legal and enforceable : *Babubhai Tansukhlal* v. *Madhavji Gobindji*, 55 Bom. 503. A Full Bench of the Madras High Court has taken the same view in *Subbaraju* v. *Venkatramaraju*, 51 Mad. 800, as also the Allahabad High Court in *Gajendra Singh* v. *Durga Kumar*, 47 All. 637 and *Ram Devi* v. *Ganeshi Lal*, 48 All. 475. But the Calcutta High Court has taken a contrary view : *Dekari Tea Co.* v. *The India General Steam Navigation Co. Ltd.*, 25 C. W. N. 127 ; *Amarchand* v. *Banwarilal*, 49 Cal. 608 ; *Girimani* v. *Tarini*, 55 Cal. 538. The Lahore High Court has taken the same view as the Calcutta High Court : *Nihal Singh* v. *Ashtawakar*, A.I.R. (1930) L. 860. This matter is now regulated by sec. 47 of the Indian Arbitra-

Calcutta and Lahore take view contrary to Bombay.

tion Act, 1940, which will be discussed at the proper place.

Whether matters at issue and matters not at issue can form part of one and same arbitration kept open in 53 Cal. 258 P.C.

Whether in one and the same arbitration, matters at issue in the suit and matters not at issue in the suit in which persons not parties to the suit are interested could be held is a question which was kept open by the Judicial Committee in *Ram Protap Chamria* v. *Durga Prosad Chamria*, 53 Cal. 258 P. C. This is an important decision worthy of careful perusal.

Court has no power to appoint arbitrator except in manner agreed upon.

In Arbitration in suits "the arbitrator shall be appointed in such manner as may be agreed upon between the parties" : sec. 22. The Court has no power to appoint an arbitrator except in the manner agreed upon between the parties, but sec. 25 provides that "the Court may, in any of the circumstances mentioned in secs. 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration." Secs. 8, 10, 11 and 12 which appear in Chapter II, applies to "Arbitration without intervention of a Court", but by reason of sec. 25 they have also been made applicable to arbitrations in suits.

Court makes order of reference under sec. 23.

The Court makes the order of reference under sec. 23, and when that is done "the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit" : sec. 23 (*2*).

Court to specify time for making of award.

The Court "shall in the order specify such time as it thinks reasonable for the making of the award" : sec. 23(*1*).

The provision for fixing time being mandatory, the failure to do so is a defect fatal to the

order of reference : *Lachmandas* v. *Abparkash*, 30 All. 169. Where the arbitrator completes and signs the award within the time fixed by the Court, it is no objection to the validity of the award that it reached the Court late : *Sita Ram* v. *Bhawani Din*, 26 All. 105 ; *Arunachalam* v. *Arunachalam*, 22 Mad. 22 ; *Gopalji* v. *Chhaganlal*, 45 Bom. 1071 ; *Debendra Nath* v. *Sarbha Mangola*, 8 C.W.N. 916.

Failure to fix time is fatal defect to order of reference.

Although by reason of sec. 23(2) the Court shall not deal with the matter referred to arbitration, yet the Court does not part with its duty to supervise the proceedings of arbitrators acting under its orders : *Ramprotap* v. *Durgaprosad*, 53 Cal. 258 P. C.

Court not divested of power of supervision in arbitration proceedings by sec. 23(2).

There are some authorities of the Patna High Court which hold that the Court retains inherent jurisdiction under sec. 151 of the Civil Procedure Code : *Anand Das* v. *Rambhusan*, A.I.R. (1932) Pat. 566 ; *Lachman* v. *Moghal*, 6 Pat. L. T. 488.

Patna High Court holds Court's inherent jurisdiction under sec. 151, C. P. C.

It has to be remembered that inherent jurisdiction must be exercised with extreme caution and on well-known principles which will be found treated in the notes under sec. 151 in Mulla's Civil Procedure Code.

As has already been indicated, it is doubtful whether in dealing with arbitrations, the law relating to which has been consolidated, the Courts can invoke the aid of "inherent jurisdiction". It is difficult to find any reasonable ground for upholding such a power.

Doubtful whether Court can invoke inherent jurisdiction for any reasonable ground.

The Arbitration Act, 1940, makes express provision by sec. 24 for reference to arbitration

Sec. 24 provides for reference to arbitration by some parties provided difference can be separated from subject-matter.

by some of the parties to the suit, but the condition precedent is that the difference between the parties applying for reference "can be separated from the rest of the subject-matter of the suit". On such a reference "the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference".

This is a decided improvement and has made it unnecessary to consider rulings under the previous law where there was no express provision for reference to arbitration by some of the parties to a suit.

Sec. 25 relates to provisions applicable to arbitration in suits.

The last section in Chapter IV, that is, sec. 25 relates to provisions applicable to arbitration in suits, namely, provisions in other Chapters so far as they can be made applicable. Sec. 15 runs thus :

"Provided that the Court may, in any of the circumstances mentioned in secs. 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under sec. 19, it shall proceed with the suit".

LECTURE X

GENERAL PROVISIONS RELATING TO AWARD

General Provisions

These are contained in Chap. V and apply to all arbitrations, save as otherwise provided in the Act by sec. 26.

The next section, that is sec. 27, enacts a provision based on the English Arbitration Act, 1934, sec. 7 (*k*), which was absent in the earlier Indian statutes, namely, the power of arbitrators to make an interim award, and, consequently, the absence of power on their part to make an interim award.

Sec. 27 enacts power to make interim award.

By sec. 7 (*j*) of the English Act—a matter which has already been discussed—arbitrators have been empowered to order specific performance of any contract other than a contract relating to land or interest in land. However, this provision has not been adopted in the Indian Arbitration Act of 1940. Even in the absence of such a provision it was held in England : "The Court can enforce specific performance of an award, or, to be more accurate of the contract between the parties to abide by the award in the same way, as it can decree specific performance of any other contract" : *Doleman & Sons* v. *Ossett Corporation*, (1912) 3 K. B. 257.

Sec. 7 (*j*) English Act 1934 not being adopted in Indian Act 1940, arbitrators not empowered to order specific performance.

A matter on which all doubts have been removed is that of the power of the Court to enlarge time for making the award, even when the time fixed for it has expired : cf. sec. 28. This being the position, it is unnecessary to discuss

Sec. 28 removes doubt whether Court has power to enlarge time, award made or not.

the numerous English and Indian authorities or any of them, which discuss the question whether time can be enlarged after the award has been made, as sec. 28 uses the words "whether the award has been made or not".

Sec. 28(2) enacts that arbitrators or umpire may not enlarge time even with consent of parties.

The second sub-sec. of sec. 28 enacts :—"28 (2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect." This section is applicable to all arbitrations, but there is no scope for its use in connection with arbitrations in a suit where the fixing of the time and its enlargement are matters for the Court.

Generally speaking where there is no time limit for the return of the award, reference is a nullity : *Nusserwanjee* v. *Meer Mynoodeen*, 6 M. I. A. 134, inasmuch as the provision for fixing a time is mandatory : *Har Narain* v. *Choudhurani Bhagwant*, 13 All. 300. But there can be no doubt that if parties agree to a certain time limit, that does not take away the Court's power to extend it beyond such agreed limit : *Knowles* v. *Bolton Corporation*, (1900) 2 Q. B. 253 ; *May* v. *Harcourt*, (1884) 13 Q. B. D. 688 ; *Parkes* v. *Smith*, (1850) 15 Q. B. 297.

Russell's answer to whether parties can agree to submission that unless award is made within fixed time, submission

While this is quite clear, is it open to the parties to agree in the submission that unless the award is made within, say, two months, the submission shall cease to be operative ? This question has been answered in *Russell on Arbitration and Award*, 13th. Ed., p. 141 thus :—"Though the power of revoking a submission is taken away by sec. 1 of the Arbitration Act,

1889, there seems to be nothing to prevent the parties from making contracts limiting the time within which the award shall be made in order to be effective, and agreeing that in the event of the award not being made within the time so limited, the submission shall be at an end. There is no revocation in such a case, but the submission comes to an end by agreement between the parties." In this connection the learned author refers to *Randell* v. *Thompson*, (1876) 1 Q. B. D. 748 at p. 758. See, however, sub-sec. (4) of sec. 37 of the Indian Arbitration Act, 1940, the provision of which has been adopted from sec. 16 of the English Arbitration Act, 1934.

shall cease to be operative.

In connection with arbitration agreements to which the above sub-sec. applies, the Court has power to extend the time "if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired." In such a case the Court may extend the time for such period as it thinks proper on such terms as the justice of the case may require.

By the next sec. that is sec. 29, the Court is empowered to order interest at reasonable rate from the date of decree where the award is for payment of money.

Sec. 29 empowers interest from decree when award for money.

The law prevailing before the Act of 1940 about the power of the arbitrators to decree interest after the date of the award and the conflict of authorities will appear from the judgment in *Bhowanidas Ramgobind* v. *Harsukhdas Balkisendas*, 27 C. W. N. 933.

27 C. W. N. 933 on power to decree interest after award and on conflict of authorities.

27 C. W. N. 494 decides whether arbitrator has power to decree interest after date of award.

As regards the the second point that the arbitrators had no authority to allow interest after the date of the award, reference has been made to the decision of Greaves, J. in *Sewdutrai Narsaria* v. *Tata Sons Ltd.*, 27 C. W. N. 494, as an authority for the proposition that the arbitrators exceeded their authority when they allowed interest after the date of the award. If Greaves, J., intended to lay this down as an inflexible rule of law, one is not prepared to follow his ruling. On the other hand, we find that in *Uttamchand Saligram* v. *Mahmood Jewa Mamooji*, 23 C. W. N. 704, interest was allowed as has been done by the arbitrators in the previous case. The decision in *In re Morphett*, (1845) 14 L. J. Q. B. 259, proceeded upon its special facts, and *In re Badger*, (1819) 2 B. & A. 691, shows that the arbitrators have authority to make a decree for such damages as might have been assessed by the Court ; see also *Edwards* v. *G. W. Ry. Co.*, (1851) 11 C. B. 588 ; *Sherry* v. *Oke*, (1833) 3 Dowl. 349 and *Beahan* v. *Wolfe*, (1832) 1 Al. and Na. 233 (Irish).

Dealing mainly with jurisdiction object of sec. 31 aims at reducing possibility of connected matters being taken from one Court to another.

The provision relating to the question of jurisdiction of Courts in relation to arbitrations and awards, as embodied in sec. 31 of the Act, is a desirable measure. The object is to reduce the possibility of connected matters being taken from one Court to another. Sec. 2(*c*) defines 'Court' as "a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit etc." If differences relate to properties in the districts of Hooghly, Birbhum and Dacca, the Courts at all the three places will have

jurisdiction, with the result that the award may be filed in the Dacca Court and that some application in connection with the award or the arbitration may be made in the Court of Birbhum or Hooghly. The scheme of sec. 31 is that as soon as the first application in connection with an arbitration-matter has been made in some Court having jurisdiction, that Court alone will be competent to decide all questions in relation to that particular arbitration, the language of sub-sec. (*4*) being :—

"Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

The first application, therefore, fixes the venue for all future proceedings.

Scheme of Act 1940 prevents suits regarding arbitration matters.

The scheme of Indian Arbitration Act, 1940, is to prevent suits in connection with arbitration matters and to have all questions decided by applications. This result has been achieved by secs. 32 and 33 :—

Suits barred for contesting arbitration agreement.

"32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in

any way affected otherwise than as provided in this Act."

Arbitration agreement or award to be contested by application.

"33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :—

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery or particulars as it may do in a suit."

Existence or validity of arbitration agreement or award, how to be attacked.

Attention is drawn to the very wide language used in those two sections. The question whether, when the very existence of the arbitration agreement is denied, a party can be compelled to apply under the provisions of the Arbitration Act, or he can have the right to institute a suit for decision of this question, has been answered by including the words "the existence or validity of an arbitration agreement or an award" in secs. 32 and 33 ; and the same remarks apply to the controversies on the 'effect' of an award or arbitration agreement. In *Kitts* v. *Moore and Co.*, (1895) 1 Q. B. 253, the Court issued injunction against a defendant restraining him from proceeding with the arbitration where an action had been brought impeaching the arbitration agreement, and in *Edwards Grey & Co.* v. *Tolme and Runge*, (1914) 31 T. L. R. 137, the Court refused to stay a suit which had been brought for restraining the defendant from proceeding to arbitration on the ground that the

contract containing the arbitration agreement had been dissolved by the outbreak of war. This class of cases has been considered and followed in India in *Sardarmull* v. *Agarchand*, 23 C. W. N. 811 ; *Ramdas Khatau* v. *The Atlas Mills Co.*, 55 Bom. 659 ; but having regard to the language of secs. 32 and 33, such authorities must be deemed to have been overruled and made inapplicable. The wideness of the language used is not free from criticism. Supposing an award is made today between *A* and *B*, and the award proceeds to declare the rights of the parties to demarcate areas, to describe the easements etc. The parties are quite satisfied with the award, but the question may arise later as to the exact effect of the award. A suit having been brought in such circumstances, the plaintiff and the defendant attribute different effects to the award. How is the language of secs. 32 and 33 to be applied to such a situation ?

Stay Of Legal Proceedings

The Act then proceeds by sec. 34 to regulate the power of Court to stay legal proceedings where there is an arbitration agreement, a matter dealt with by sec. 19 of the Indian Arbitration Act, 1899, para. 18 of the Second Schedule of the Civil Procedure Code, 1908, and sec. 4 of the English Arbitration Act, 1889.

Power of Court to stay legal proceedings in arbitration agreement.

In sec. 34 of the Arbitration Act, 1940, the conditions under which the Court may stay legal proceedings are :—

(*a*) That party to an arbitration agreement or any person claiming under him commences legal proceedings against any other party to the agreement or any person claiming under him ;

Conditions under which Court may stay legal proceedings.

(*b*) That the proceedings are in respect of any matter agreed to be referred.

In such case any party to such legal proceedings may apply to stay such proceedings, provided the application is made (*1*) at any time before filing a written statement or (*2*) taking any other steps in the proceedings.

The conditions to be satisfied before proceedings may be stayed are :—

(*c*) That the applicant was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.

(*d*) That the Court has to be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and

It will be necessary to discuss these topics, though not necessarily in the order in which they have been stated, remembering that even when all the conditions required by the statute are fulfilled, the Court has discretion to refuse or allow stay of proceedings : *Kedarnath* v. *Sumpatram*, 47 Cal. 1020.

(*a*) "Where any party to an agreement or any person claiming under him commences legal proceedings" etc.

Courts power to exercise stay not called for valid agreement.

The exercise of power by the Court to stay proceedings cannot be called for unless there is a valid arbitration agreement. The topic how an arbitration agreement or submission may come to an end has been discussed already, that is, where the contract is determined by something

outside itself, in which case the arbitration clause as part of the agreement is also determined: *De La Garde* v. *Worsnop & Co.*, (1928) Ch. 17, or on breach of a condition going to the root of the contract coupled with the repudiation of the liability, a situation discussed in class of cases, like, *Jureidini* v. *National British Co.*, (1915) A. C. 499, or where the contract is ended by "frustration" : *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.*, (1926) A. C. 497.

Again, authorities, like, *Atlantic Shipping and Trading Co.* v. *Dreyfus & Co.*, (1922) 2 A. C. 253, previously referred to, show that in the contract there may be a provision, which if not complied with, parties agree that the claim shall be deemed to be waived and absolutely barred, in which case the arbitration clause does not remain operative, such an agreement not being opposed to public policy.

Arbitration agreement or submission must be before institution of suit.

The arbitration agreement or submission must be before the institution of the suit. In *Peruri Suryanarayan* v. *Gullapudi Chinna*, 34 Bom. 372, it was said following *Ramjidas Poddar* v. *Howse*, 35, Cal. 199 : "Unless there has been a submission to arbitration before the suit is filed, an application for stay of proceedings cannot be made."

Arbitration Act 1899 applied where subject-matter submitted was subject-matter of suit.

The Indian Arbitration Act, 1899, applied only to cases, where, if the subject-matter submitted to arbitration were the subject-matter of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town. Supposing the subject-matter consisted of a Calcutta house and a mofussil Zemindari, and the suit was pending in a mofussil Court, could such suit be

stayed ? The question was answered in the affirmative in *In re Babaldas Khemchand*, 45 Bom. 1, on the ground that the Indian Arbitration Act, 1899, applied to the submission, and it was immaterial whether the suit was pending in a Presidency Town or in the Mofussil. If the suit could have been instituted only in a Court, not being a Chartered High Court, then the provisions for stay and its conditions were to be found in para. 18, Second Schedule, Civil Procedure Code, 1908. The Code fixed an outer limit for the application for stay of proceedings by using the words at or before settlement of issues, which are absent in the corresponding provision in sec. 19 of the Indian Arbitration Act, 1899 ; but there was no material difference between the Civil Procedure Code, 1908, and the Indian Arbitration Act, 1899, in the matter of stay of suit, where there existed an agreement between the parties for reference to arbitration. These questions can no longer arise, inasmuch as theIndian Arbitration Act, 1940, applies to all arbitrations : see sec. 46. "Before the jurisdiction of the Court to make an order for stay under section 19 can be invoked, it must be established beyond doubt that there is a valid submission"—per Mookerjee J., in *Kedarnath* v. *Sumpatram*, 47 Cal. 1020 at p. 1025.

No stay when written contract containing arbitration clause altered by writing or parole.

When the terms of the written contract containing the arbitration clause has been materially altered by writing or parole, the change may amount to substitution of the original contract by a substantially different one, in which case no stay may be granted : *Lachminarain* v. *Hoare Miller & Co.*, 41 Cal. 35, a case which also

discusses the situation where there is no such substitution by reason of some unsubstantial alteration.

Condition of submission being satisfied, proceedings to be commenced by party or somebody claiming under him.

The condition of a valid and subsisting submission having been complied with, it has to be seen whether the proceedings were commenced by a party to the submission or some person claiming under him. It has been held that the trustee of a bankrupt is such a person : *Sturgis* v. *Curzon*, (1851) 21 L. J. Ex. 38. A workman, who had been insured against his accidents by a policy containing an arbitration clause taken out by his employer, has been held to be such a person : *King* v. *Phœnix Assurance Co.*, (1910) 2 K. B. 666.

The mortgagee of the share of one of the partners in a firm, the partnership-deed of which contained an arbitration clause, having brought his suit against all the partners for an account of the mortgagor's share, it was held that the right to account was independent of the deed and that the suit should not be stayed : *Bonnin* v. *Neame*, (1910) 1 Ch. 372.

Unusual case of stay in (1910) 2 K.B. 666.

Rather an unusual case is that of *King* v. *Phœnix Assurance*, (1910) 2 K. B. 666. The employing company was insured against accident to the employees and the policy contained an arbitration clause. In the winding up proceedings a workman claimed compensation. This was stayed pending reference to arbitration.

No stay where no dispute at time of institution.

Equally the Court will not stay a suit where there was no dispute at the time of its institution : *London and North Western and Great Western Joint Railway Cos.* v. *Billington*, (1899) A. C. 79.

No stay allowed when arbitration agreement not into existence on date of suit.

A divorce suit having been compromised on the terms that there should be a separation-deed with usual covenants and that in "case of difference in working out these terms, matter to be referred." A suit having been brought for settling the covenants, an attempt was made for its stay in reliance on the arbitration clause, the Court refused stay on the ground that the arbitration agreement had not come into operation at the date of the suit : *Hart* v. *Hart*, (1881) 16 Ch. D. 670.

Existence of dispute for purpose of stay inferred from surrounding circumstances.

In the aforementioned case in (1899) A. C. 79, the arbitrator had no jurisdiction because at the time of the institution of the suit no dispute had arisen, but the existence of a dispute may be inferred from surrounding circumstances, for example, where the arbitration clause provided that "no dispute shall be deemed to have arisen until seven days' notice had been given", it was held that a letter of repudiation amounted to notice of dispute : *Howden* v. *Powell Duffryn Steam Coal Co.*, (1912) S. C. 920.

(*b*) Proceedings are in reference to matters agreed to be referred :—

Whether matter for reference and subject-matter of proceedings are same, Court to decide.

Where it is disputed that the matters agreed to be referred to arbitration and the subject-matter of the legal proceedings are the same, it will be a matter for the Court to decide and not for the arbitrators : *Piercy* v. *Young*, (1879) 14 Ch. D. 200. Further, as Buckley, L. J. said in *Pethick Brothers* v. *Metropolitan Water Board*, (1911) *Hudson's Building Contracts*, 4th Ed., Vol. II., p. 456 : "If you have an event defined upon which there is to be a right to arbitration, the arbitration cannot extend to ascertain whether

the event has happened or not." (This quotation is taken from *Russell on Arbitration and Award*, 13th. Ed., p. 91).

Where jurisdiction of arbitrators to decide depends on certain agreed conditions, matters decided not by arbitrator but by Court.

The principle deducible from the authorities bearing on this matter, like, *Measures* v. *Measures* (1910) 2 Ch. 248; *General Billposting Co.* v. *Atkinson*, (1908) 1 Ch. 537, is that where the jurisdiction of the arbitrators to decide matters depend on the fulfilment of certain agreed conditions, they cannot clothe themselves with the jurisdiction by deciding the question in their own favour, and if disputed, the matter has to be adjudicated upon by a Court. For instance, where it was agreed that the arbitration would not start until certain works had been completed, and the arbitrators gave an award having determined that the works had been complete, the award was held to be unenforceable, because the Court found that the works had not in fact been completed : *Smith* v. *Martin*, (1925) 1 K. B. 745. Where the submission provided for arbitration in case of any difference arising during a tenancy and the party refused to go to arbitration on the ground that the dispute had not arisen during the tenancy, the arbitrator was held to have no jurisdiction to decide whether the condition precedent to the exercise of such jurisdiction had been fulfilled or not : *May* v. *Mills*, (1914) 30 T. L. R. 287. Another example will be found in *De Ricci* v. *De Ricci*, (1891) p. 378.

In considering these authorities it has to be remembered that the submission may be drawn in such wide language that the arbitrator may be authorised by it to decide whether any particular

dispute is within the submission as in *Willesford* v. *Watson*, (1873) L. R. 8 Ch. 473.

It may well be that the suit and the submission to arbitration, while covering common ground to some extent, do not as regards each relate to the entirety of the subject-matter in dispute. This will be discussed in connection with the Court's discretion to order stay of suit or other legal proceedings.

Where subject-matter of suit outside agreement, Court will refuse stay.

Where the subject-matter of the suit is outside the scope of the arbitration agreement, there is no difficulty presented and the Court will refuse stay : *Jnanendra* v. *Sinclair Murray and Co.*, 34 C. L. J. 173 ; *Lawson* v. *Wallasey Local Board*, (1882) 11 Q. B. D. 229 ; *Daunt* v. *Lazard*, (1858) 17 L. J. Ex. 399 ; *Thomas* v. *Portsea S. S. Co.*, (*the* '*Portsmouth*') (1912) A. C. 1.

'*Apropos* of matter agreed to be referred' depends on terms of submission.

"*Apropos* of matter agreed to be referred". This must necessarily depend on the terms of the submission and their proper construction. Further the result may depend on whether an arbitration clause appearing in a contract has become incorporated in another under which differences have arisen.

When arbitration clause in first contract becomes not incorporated in second, Court has no power to stay. Conflicting decisions reviewed in 38 C. W. N. 737.

In the Calcutta High Court, on more than one occasion, the question has been discussed whether when there is a provision like "As we bought the goods of Punnalal Sagoremull we sold to you in the same way. All the terms and conditions are the same as there", the arbitration clause in the first contract becomes incorporated in the second. If there is no such incorporation, the Court has no power to order stay. The

conflicting decisions are reviewed by Roy, J. in *Ramlal Murlidhar* v. *Haribux Puranmull*, 38 C. W. N. 737, but it will not serve any useful purpose to discuss the various Calcutta cases, a point of view which is borne out by the following statement of Roy, J. in the above-mentioned case.

"It seems to me that the question is really one of construction of the particular *sowdah* in suit, but the English cases are useful for certain observations made by learned Judges in the course of their judgments in those cases. I should like particularly to refer to the case reported in *T. W. Thomas and Co. Ld.* v. *Portsea Steamship Co. Ld.*, (1912) A. C. 1 at page 6, and to the observations of Lord Gorell at pp. 8-9. I may also refer to the judgment of Vaughan Williams, L. J. in the case of *The 'Portsmouth'*, (1911) P. 54 at p. 63."

While it is true that in each case it is a matter of construction of the submission clause, the principle seems to be that if there is any ambiguity, the jurisdiction of the Court should not be ousted by making an order for stay.

"There is a wide consideration which, I think, it is important to bear in mind in dealing with this class of case. The effect of deciding to stay this action would be that either party is ousted from the jurisdiction of the Courts and compelled to decide all questions by means of arbitration. Now, I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect :" *per* Lord Gorell in *T. W. Thomas & Co. Ld.* v. *Portsea Steamship Co. Ld.*, (1912) A. C. 1 at p. 9.

When application is to be made. Interpretation of 'step in the proceedings.'

(*c*) Application is to be made at any time before filing a written statement or taking any step in the proceeding. As regards a "step in the proceedings," the best description has been given by Lindley, L. J., in *Ives and Barker* v. *Willans* (1894) 2 Ch. 478 at p. 489, namely, it is "something in the nature of an application to the Court, and not mere talk between solicitors and solicitor's clerks nor the writing of letters, but taking out a summons or something of that kind."

After quoting this description Page, J. has thus applied it in *Bhowanidas Ramgobind* v. *Pannachand Luchmipat*, 52 Cal. 453 :—"To apply for a copy of the plaint is merely to seek information in order that the defendant may ascertain the nature of the plaintiff's claim. In so doing the defendant does not, and is not to be deemed to indicate his acquiescence in the course adopted by the plaintiff for the purpose of settling the dispute which has arisen, for until he is made aware of the plaintiff's cause of action he is not in a position to elect whether he will proceed by way of arbitration or will assent to the litigation which has been commenced against him" (at p. 459).

What constitutes 'step in the proceedings.'

A fairly good test is whether by the step taken the defendant has shown an unequivocal desire to allow the suit to proceed, but if he has done an act which clearly amounts to a "step in the proceedings", he cannot undo its effect by adding a statement that he does not want the suit to proceed. Thus in connection with the defendant applying against the plaintiff for security for costs, Mookerjee, J. said in *Joylall*

and Co. v. *Gopiram Bhotica*, 47 Cal. 611 at p. 619 :—"By asking for security, the defendant has shown his willingness to proceed in the action if that security were given, and showed also that he was not complying with the condition in the section that he should be ready and willing to go to arbitration." *Adams* v. *Catley*, (1892) 66 L. T. R. 687, similarly lays down that applying for security for costs amounts to a "step in the proceedings". Again, taking out a summons for making an application for extension of time to file written statement has been held to be a "step in the proceedings" : *Ford's Hotel Co.* v. *Bartlett*, (1896) A. C. 1. This case was tried to be distinguished in *Sarat Kumar Roy* v. *Corporation of Calcutta* in 34 Cal. 443, on the ground that the defendant, when applying for time, clearly expressed the intention of enforcing the arbitration clause. This contention was negatived by Woodroffe, J. saying :—"The issue however is not whether upon the facts the proper inference to be drawn is that there was no abandonment of the election to arbitrate. What I got to see is whether this matter comes within the terms of sec. 19". It is immaterial whether a written application is made for extension of time to file written statement, or the same is done verbally by the defendant's lawyer : The *Karnani Industrial Bank Ltd.* v. *Satya Niranjan Shaw*, 28 C. W. N. 771. Attending a summons for directions or giving an undertaking will amount to a "step in the proceedings." : *Ochs* v. *Ochs Brothers*, (1909) 2 Ch. 121 ; *County Theatres and Hotels Ltd.* v. *Knowles*, (1902) 1 K. B. 480 ; *Richardson* v. *Le Maitre*,

(1903) 2 Ch. 222. According to the decision in *Joylall* v. *Gopiram*, 47 Cal. 611, the filing of an appeal from an order restraining the defendant from proceeding with the arbitration does not amount to a "step in the proceedings," nor merely the filing of an application for adjournment of the suit. The fact that the defendant, when taking a "step in the proceedings", had not a copy of the agreement on which the suit was based and which contained an arbitration clause, is immaterial : *Parker Gaines and Co.* v. *Turpin*, (1918) 1 K. B. 358. In the description of a "step in the proceedings" given by Lindley, L. J., it will be remembered that he used the words "not mere talk between solicitors or solicitor's clerks nor writing of letters". On this ground a letter from the defendant's solicitor requesting for further time does not amount to a "step in the proceedings" : *Brighton Marine Palace Ltd.* v. *Woodhouse*, (1893) 2 Ch. 486. Where the plaintiff applies for a Receiver and the defendant files an affidavit in reply, the same does not amount to a "step in the proceedings" : *Zalinoff* v. *Hammond*, (1898) 2 Ch. 92.

Interpretation of 'ready and willing'.

(*d*) "Ready and willing". The applicant has to establish that at the time when proceedings were commenced, he was, and at the time of making the application he remains, ready and willing to do all things necessary to the proper conduct of the arbitration according to sec. 34 of the Arbitration Act, 1940 : *Kedarnath* v. *Sumpatram*, 47 Cal. 1020. Certain authorities, like *Koomud Chunder* v. *Chunder Kant*, 5 Cal. 498 and *Crisp* v. *Adlard*, 23 Cal. 956, relied on sec. 21 of the Specific Relief Act for the proposition

that the defendant must show that the plaintiff refused to go to arbitration and that mere filing a suit may not amount to refusal etc. It was pointed out in *Dinabundhu Jana* v. *Durga Prosad Jana*, 46 Cal. 1041, that so far as the Second Schedule of the Civil Procedure Code of 1908 was concerned, it amended sec. 21 of the Specific Relief Act and was no bar to the institution of suit, but the defendant's only remedy was to apply for stay of the suit. The Indian Arbitration Act, 1940, has amended sec. 21 of the Specific Relief Act by adding the words "other than an arbitration agreement to which the provisions of the Act of 1940 applies," and sec. 26 of this Act provides "save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations." Consequently sec. 21 of the Specific Relief Act need not be considered at all, and in each case the question is whether conditions for stay stated in sec. 34 apply to the application for stay of the suit. Where the defendant has been guilty of delay in proceeding with the arbitration proceedings, that fact by itself may not show that he was not "ready and willing", as required by the statute : *Hodgson* v. *Railway Passengers' Assurance Co.*, (1881) Q. B. D. 188, but this case is not of much assistance as having been decided on its very peculiar facts.

(*c*) The Court has to be "satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement". The expression "may make an order staying proceedings" as also the condition about the Court's satisfaction make the order of stay a discretionary one, as was pointed out by

Interpretation of Court "being satisfied that there is no sufficient reason why matter should not be referred

in accordance with arbitration agreement".

Buckley, L. J. in *Freeman* v. *Chester Rural District Council*, (1911) 1 K. B. 783. While each case must depend on its own facts, the authorities have established certain principles on which the discretion should be exercised.

(1) The first principle is that *prima facie* it is the duty of Courts to enforce an agreement by which parties have selected a domestic *forum* : *Willesford* v. *Watson*, (1873) L. R. 8 Ch. 473 ; *Law* v. *Garrett*, (1878) 8 Ch. D. 26 ; *Lyon* v. *Johnson*, (1889) 40 Ch. D. 579. It being the *prima facie* duty of the Court to make the parties abide by their agreement, the plaintiff has to discharge the onus of showing that this should not be done and that the suit should be allowed to proceed : *Dinabundhu* v. *Durgaprasad*, 46 Cal. 1041 ; *Vawdrey* v. *Simpson*, (1896) 1 Ch. 166 ; *Doleman* v. *Ossett Corporation*, (1912) 3 K. B. 257 ; *Ganesh Das* v. *Durga Dat*, 2 Lah. 19. Authorities of the class just referred to proceed on the principle that *prima facie* the arbitration agreement is binding on the parties to it, and, if one of them commits breach of that agreement by bringing a suit, he must take upon himself the burden of establishing that sufficient reasons exist for inducing the Court to condone the breach of agreement on his part by refusing to stay the suit and thus nullifying the arbitration agreement. The fact that the parties have agreed to refer their disputes to a foreign tribunal is no ground for refusing stay : *Maritama Italiana Steamship Co.* v. *Burjor*, 32 Bom. L. R. 43. As in the case of other submissions, the proceedings will be stayed, unless the Court is satisfied that there are good grounds for refusing stay, and

the parties will be left to have their differences adjudicated upon by the agreed foreign forum : *Kirchner* v. *Gruban*, (1909) 1 Ch. 413 ; *Austrian-Lloyd Steamship Co.* v. *Gresham Life Assurance Society*, (1903) 1 K. B. 249.

When original Court has exercised discretion, Court of Appeal not lightly to interfere with it.

It is an well-settled principle that where the original Court has exercised its discretion, it will not be lightly interfered with by the Court of Appeal. The matter is largely in the discretion of the Court, which, no doubt, must be judicially exercised. But when the discretion has been exercised by the primary Court, a strong case must be made out to justify the interference of a Court of Appeal. In this connection reference may usefully be made to the observations of Buckley, L. J. in *Freeman and Sons* v. *Chester Rural District Council*, (1911) 1 K. B. 783, and see also *Vawdrey* v. *Simpson*, (1896) 1 Ch. 166 ; *Barnes* v. *Youngs*, (1898) 1 Ch. 414 ; *Jokiram* v. *Ghaneshamdas*, 47 Cal. 849 ; *Kedarnath* v. *Sumpatram*, 47 Cal. 1020. While the discretion has to be judicially exercised, the *prima facie* inclination of the Court is to have the disputes settled by the forum chosen by the parties : *Manindra* v. *Low and Co.*, A. I. R. (1924) C. 796, a proposition which has been established by the authority already cited and which throws the onus on the party contravening the agreement of establishing sufficient grounds for the stay of suit being refused.

Stay for reason of costs and expenses discretionary.

The fact that an arbitration may mean more costs and expenses to the parties than proceedings in a Court was held to be no ground for refusing stay in *Denton* v. *Legge*, (1895) 72 L. T. 626, but it cannot be regarded as a general authority for

the proposition that increased expenses may not be a sufficient ground for refusing stay.

Special consideration required where charges of personal misconduct, fraud &c. exist.

Where there are charges of personal misconduct, fraud etc., the matter requires special consideration. The English Arbitration Act, 1934, contains a statutory enactment in sec. 14(2). It provides that where the dispute which has arisen involves the question whether a party to the arbitration agreement has been guilty of fraud, the Court shall, so far as necessary to enable that question to be determined by the Court, have power to give leave to revoke any submission made thereunder. This provision has not been adopted in the Arbitration Act, 1940, but it is clear from the authorities before the date of the statute of 1934 that if the party charged with fraud desires to have the matter investigated in a Court, ordinarily this will be allowed to be done by refusing stay of the suit. Buckley, L. J. in *Green* v. *Howell*, (1910) 1 Ch. 495 at p. 511 after referring to *Barnes* v. *Youngs*, (1898) 1 Ch. 414 said :—"The second ground" for refusing stay "was that inasmuch as there was a question between the partners whether the partner in giving the notice had acted in good faith, that was a charge which ought to be dealt with by a Court of Justice and not by an arbitrator. That, of course, was a perfectly good ground." If the party who is charged with fraud prefers trial in a Court to proceedings before the domestic forum, (in the absence of special circumstances, some of which will be indicated later) the Courts are inclined to help him by refusing stay of the action : *Minifie* v. *Railway Passengers' Assurance Society*, (1881) 44 L.T. 552.

In a dispute arising out of a contract of sale, a party was charged with false representation as to quality and the Court refused stay : *Wallis* v. *Hirsch*, (1856) 26 L. J. C. P. 72. In addition to the cases already mentioned the principle under discussion has been considered in numerous authorities, such as, *Russell* v. *Harris*, (1891) 65 L. T. 752 ; *Green* v. *Howell*, (1910) 1 Ch. 495 ; *Monro* v. *Bognor Urban Council*, (1915) 84 L. J. K. B. 1091 ; *Nobel Brothers Petroleum and Co.* v. *Stewart*, (1890) 6 T. L. R. 378.

However, a mere allegation of fraud in a case where the issue of fraud need not be decided is no ground for refusing stay : *Hirsch* v. *Im Thurn*, (1858) 27 L. J. C. P. 254, where the Court held that the arbitrators might decide the question of warranty without going into the question of fraud, the issue as to which should not be allowed to be raised. It seems to be clear that if charges of fraud have been raised in such a manner that it would be necessary for the arbitrator to investigate them, then the party charged with fraud should be allowed to have that done in the open Court, which will be the consequence of refusing stay of suit. The Court starting with the inclination of holding parties bound by their agreement will scrutinise the facts carefully in order to satisfy itself that the matter of charge of fraud has not been put up with the object of getting out of an agreement, which *prima facie* should be adhered to by the parties thereto. The Court will have to be satisfied that the facts of the case are such that the arbitrator will have to deal with the charge of fraud having regard to the scope of the arbitra-

tion agreement, but some English authorities have gone to unreasonable length in refusing stay by applying this principle. For instance, where the partnership agreement contained an arbitration clause and a partner charged his co-partners with misappropriation of partnership funds, stay was refused in *Cook* v. *Catchpole*, (1864) 11 L. T. 264, and *Alexander* v. *Mendl*, (1870) 22 L. T. 609, is on the same lines.

In *Russell on Arbitration and Award*, 13th. Ed., p. 101, the learned author expresses the opinion—"Nevertheless in view of sec. 14(*2*) of the 1934 Act, the cases *Alexander* v. *Mendl*, (1870) 22 L. T. 609 ; *Wallis* v. *Hirsch*, (1856) 26 L. T. C. P. 72 ; *Russell* v. *Harris*, (1891) 65 L. T. 752 and *Hoch* v. *Boor*, (1880) 49 L. J. & B. 665, might not be followed."

It is submitted that although sec. 14(*2*) of the English Act has not been adopted in the Arbitration Act, 1940, yet it will bear reproduction of the provisions of that section :—

Discretion of Indian Courts for stay of proceedings not affected by Act 1940.

"Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder." While, therefore, the Indian Courts have not the power given by sec. 14(*2*) of the English Arbitration Act, 1934, namely, to order that the agreement shall cease to have effect and to give leave to

revoke the submission, their discretion for stay of proceedings is in no way affected by the absence of a provision like that contained in sec. 14(*2*), and they can render the arbitrator *functus officio* by refusing stay. There is no reason why the Indian Courts should follow the decisions, which, according to the learned author quoted above, might not be followed in England.

What are disputes involving questions of law.

Disputes involving questions for law. It was said in *Bristol Corporation* v. *John Laird and Co.*, (1913) A. C. 241, that "Everybody knows that with regard to the construction of an agreement it is absolutely useless to stay the action, because it will only come back to the Court on a case stated." A statement on the same lines was also made in *In re Carlisle*, (1890) 44 Ch. D. 200. It has to be remembered, however, that in India the arbitrator cannot be compelled to state a case and, consequently, the dictum is not of much assistance here, and even in England stay of the suit has been granted even where the sole or main question has been a question of law. For instance, in a case decided later than (1913) A.C. 241, namely, that of *Lock* v. *Army, Navy and General Assurance Association,* (1915) 31 T. L. R. 297, the Court stayed the suit, although important questions of law were involved including the proper construction of a life policy, which excluded death by war, the assured having been blown up with one of His Majesty's ships and it could not be ascertained whether that was done by the enemy. Similarly, where the sole question was the proper construction of the clauses of a charter-party, the Court stayed the suit : *Randegger* v. *Holmes*, (1886) L. R.

1 C. P. 679. On the other hand, where the dispute was as to the construction of a partnership agreement between doctors, the Court held that the disputes were such that they should better be decided by the Court than by arbitrators : *Lyon* v. *Johnson*, (1889) 40 Ch. D. 579. Again, in *Clough* v. *County Live Stock Insurance Association Ltd.*, (1916) 85 L. J. K. B. 1185, the Court held that difficult questions relating to the construction of an insurance policy justified refusal to stay the suit. These illustrations taken from authorities ordering or refusing stay of suit on the ground that the dispute involved difficult questions of law bring out that really no principle can be enunciated from them, except that result in each case depends upon the discretion of the Court, a factor sufficiently elastic to make it difficult for an advising lawyer to make any confident forecast in many cases whether the suit will be stayed or not. If, however, the dispute involves questions which particular arbitrators are especially competent and experienced for deciding, stay will be refused, although a point of law may arise on the finding of the arbitrators : see *Skinner* v. *Uzielli and Co Ltd.*, (1908) 24 T. L. R. 266, where the existence or otherwise of a custom at Lloyd's was left to be decided by the arbitrators, who were members of Lloyd's. Of the Indian authorities, the case of *Raneegunge Coal Association Ltd.* v. *The Tata Iron and Steel Co. Ld.*, 53 Bom. 271, deserves careful perusal. The original Court refused to stay the suit on two grounds, namely, (1) that a difficult and important question of law relating to limitation was involved, and (2) that there was a plea

of fraud, which was a matter that demanded that the question should be determined by the Court. In reversing this decision the appellate Court enunciated the following propositions :—

(*a*) As in England, since 1889, an arbitrator can be compelled to state a case, "it is erroneous to apply the English decisions subsequent to the English Arbitration Act without qualification to cases under our Arbitration Act and to deduce that applications for stay here should be more strictly dealt with...The distinction is to be borne in mind" (at p. 281).

(*b*) The mere fact that the plaint alleges a difficult question of law is by no means proof that it is so or that a stay should be refused.

(*c*) A party cannot by merely alleging fraud base a cause of action on fraud when the real cause of action is one *ex contractu.*

What is misconduct for arbitrator.

Misconduct of Arbitrator. Where there is a substantial dispute as to the arbitrator's conduct, a stay of the action will be refused : *Hickman* v. *Roberts*, (1913) A. C. 229, where the arbitrator was an officer of the local authority, and the Court came to the conclusion that the arbitrator had ceased to be a free agent and had forfeited his independence as the arbitrator and had allowed himself to be under the control or influence of the building owners. In another case where the agreement was for reference to arbitration by an officer of one of the parties and the other party charged such officer with unfair and unreasonable conduct, and there was a substantial dispute as to such conduct, the Court refused stay of the suit : *Blackwell* v. *Derby Corporation*, (1911) 75 J. P.

129. Staying a suit has the effect of enforcing the arbitration agreement against an unwilling party, and, consequently, stay will not be ordered, where though there is no allegation of misconduct against the arbitrator, the circumstances are such that an award is likely to be set aside by reason of his personal disqualification, for example, by reason of his concealed interest in the subject-matter—a topic which has been previously discussed—or by his acquiring interest after his appointment as in *Blanchard* v. *Sun Fire Office*, (1890) 6 T. L. R. 365; *see also Nuttall* v. *Manchester Corporation*, (1892) 8 T. L. R. 365. On the same footing will stand the situation of the appointed arbitrator who is a necessary witness: *Hogg* v. *Belfast Corporation*, (1919) 2 Ir. R. 305.

The consideration of the likelihood of bias in the arbitrator will be taken up again after considering the case where the entire dispute is not covered by the arbitration agreement.

Entire Dispute not covered by submission

Two questions are important in such a situation, namely:

When entire dispute not covered by submission.

(1) What are the comparative magnitudes of the matters within and outside the submission and (2) whether the matter outside the arbitration clause "substantially raises the same facts and rights as would fall to be determined within the arbitration clause."

The statement of law in *Turnock* v. *Sartoris*, (1889) 43 Ch. D. 150, that "it cannot be right to cut up litigation into two actions, one to be tried before the arbitrator and the other to be

tried elsewhere" is to be taken as applicable to the facts of that case, as will appear from other authorities referred to by Mukerji and Guha, JJ., in *Singaran Coal Syndicate Ld.* v. *Balmukund Marwari*, 58 Cal. 1107 at p. 1109 :—

"But the special features of the case", (i.e. 43 Ch. D. 150) "have been pointed out in later decisions. *In Ives and Barker* v. *Willians*, (1894) 2 Ch. 478, it was held that the fact, that a small portion of the relief claimed is not within the scope of the arbitration clause, is not in itself a sufficient reason for refusing to stay proceedings where the main subject of the action is within the arbitration clause."

"In *Rowe Brothers & Co. Ltd.* v. *Crossley Brothers Ltd.*, (1912) 108 L. T. 11, Hamilton, L. J. observed :—"*Turnock* v. *Sartoris* (43 Ch. Div. 150), as I know by experience, is a case one constantly quotes in the hope of preventing a case being stayed on the ground that there is something in it outside the arbitration clause, and the case which is constantly quoted unsuccessfully, because of the mere addition to any writ of a separate cause of action is not of itself sufficient to prevent the rest of the action being stayed, if it is within the arbitration clause. You must within *Turnock* v. *Sartoris* and the case before Swinfen Eady, J., of *Bonnin* v. *Neame*, (1910) 1 Ch. 732, have a matter outside the arbitration clause and yet substantially raising the same facts and rights as would fall to be determined within the arbitration clause. And then, of course, the fact that some part of the action cannot be referred is very good reason for saying, though it is a matter for discretion, that

the rest of the action which would involve the same matter ought not to be 'referred'."—(Ibid. p. 1110)

Another proposition which is referred to in the same Calcutta judgment is :—"If a question of law would arise, which is clearly outside the purview of the arbitration clause, and other questions, though within it, are so intimately connected with the former question that a more convenient course would be to try the whole action in court, a stay may be refused : *Printing Machinery Co. Ld.* v. *Linotype and Machinery Ld.*, (1912) 1 Ch. 566." (Ibid. at pp. 1111-2)

What has been said above about comparative magnitudes has been stated clearly in an Irish case : *Patteson* v. *Northern Accident Insurance Co.*, (1901) 2 Ir. R. 262 :—

"There is no doubt that the Court has power to refer one of these causes of action and to retain the other, or in proper circumstances to decline to refer the cause of action capable of being referred, and to retain both causes. The consideration that should weigh with the Court in such cases is the respective magnitude and weight of the two claims." "If the larger claim be that which consists of matters that may be referred to arbitration, then those matters should be referred, and the other cause of action retained. If, on the other hand, the matters that may be referred are small in degree, then the Court may probably keep the whole action, and decline to refer any part"— (*per* Kenny, J., at p. 266).

It has already been pointed out that where from the circumstances of the case it appears that

the arbitrator is likely to be a biased person, for example, the builder's engineer being the arbitrator in a dispute between his employer and the contractor, that fact by itself is not sufficient reason for not compelling the parties to come up before him for adjudication of the dispute.

The statement of the law bearing on this matter was very clearly stated by Sir Robert Finlay, K. C., in *Bristol Corporation* v. *John Aird & Co.*, (1913) A. C. 241. After pointing out that the engineer, who was the arbitrator, was in a certain sense the judge in his own cause, he proceeded to state his case thus :—"It follows that the arbitrator must necessarily be a somewhat biased person and must have some preconceived views on the matter in controversy ; but if he is prepared to listen to argument and to determine the matter as fairly as he can, that is all that the contractor is entitled to demand. It is no part of the duty of the Court to make a new contract for the parties."

On this matter Lord Atkinson said : "Whether it be wise or unwise, prudent or the contrary, he (the contractor) has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has the right to demand that, notwithstanding the pre-formed views of the engineer, that gentleman shall listen to argument, and determine the matter submitted to him as fairly as he can as an honest man, and if it be shewn in fact that there is any reasonable prospect that he will be so

biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of these disputes, the contractor has the right to appeal to a Court of law" (at pp. 247, 248).

On the other hand the mere fact that the arbitrator is the engineer of one of the parties is no ground for not enforcing the arbitration agreement, even though the arbitrator may have to decide whether he himself acted with due skill and competence : *Eckersley* v. *Mersey Docks and Harbour Board*, (1894) 2 Q. B. 667.

Even where the arbitrator who was the engineer of one of the parties had written to the opposite party that their claim was outrageous, the Court ordered stay of the suit holding that mere expression of opinion was no reason why the agreed arbitrator should not decide in a fair way : *Cross* v. *Leeds Corporation*, (1902), *Hudson's Building Contracts*, (4th Ed.), Vol. II, 329.

The bias of the arbitrator has been discussed here from one aspect only, namely, as a ground for restraint of arbitration, but it has to be remembered that it has other aspects as well, namely, (1) as a ground for leave to revoke submission, (2) as a ground for removal of arbitrator, (3) as a ground for setting aside award.

Other Topics in connection with "stay".

(*1*) The language of sec. 34 is 'the judicial

authority before which the proceedings are pending', whereas the language used in sec. 19 of the Indian Arbitration Act, 1899, and in para. 18 of the Civil Procedure Code, Second Schedule, is "the Court", and the word 'Court' was changed into "the judicial authority before which the proceedings are pending" by Act XXI of 1933. This amendment, which has been adopted in the Indian Arbitration Act, 1940, renders it unnecessary to consider the various conflicting decisions of Bombay, Allahabad and Calcutta on the interpretation of the word "Court" used in the earlier statutes.

Topics connected with "stay".

(*2*) It has already been stated that the Court will refuse stay if a substantial part of the dispute is outside the submission and the same principle will be followed where the arbitrator can only decide the *quantum* and not the liability : *London and Great Western Joint Rail Cos.* v. *Billington*, (1899) A. C. 79.

(*3*) Stay of suit and power of the Court to grant ancilliary reliefs, like, Injunction and Receiver.

The powers of the Court in this behalf are to be found in sec. 41 of the Indian Arbitration Act, 1940, taken with the Second Schedule, Civil Procedure Code, 1908. This has been adopted from sec. 8(*1*) of the English Arbitration Act, 1934, but even before 1934 the English Courts held that where stay of suit had been granted, it still retained the power of granting injunction or appointing receiver : *Compagnie du Sénégal* v. *Woods or Smith*, (1883) 53 L. J. Ch. 166 ; *Pini* v. *Roncoroni*, (1892) 1 Ch. 633 ; *Plews* v. *Baker*, (1873) L. R. 16 Eq. 564 ; *Law* v.

Garrett, (1878) 8 Ch. D. 26 ; *Zalinoff* v. *Hammond*, (1898) 2 Ch. 92.

The fact that the grant of injunction is beyond the power of the arbitrator is not a good ground for refusing stay : *Willesford* v. *Watson*, (1873) L. R. 8 Ch. 473.

(*4*) Where there are several defendants, any one of them can apply even where one or more of them object to stay of suit. Ibid.

LECTURE XI

STATUTORY ARBITRATIONS AND MISCELLANEOUS MATTERS

Crown to be Bound

Crown bound by arbitration agreement.

The Crown is bound by a statute unless it is so expressly provided and this has been enacted by sec. 45 of the Act.

Statutory Arbitrations

Sec. 46 makes applicable Act 1940 to statutory arbitrations.

It is becoming more and more frequent for statutes to provide that disputes shall be settled by arbitration, and sec. 46 deals with the applicability of the Indian Arbitration Act, 1940, to statutory arbitrations. Ordinarily in the absence of statutory provisions in the law of Arbitration the jurisdiction of Courts is ousted : *Norwich Corporation* v. *Norwich Electric Tramways Co.*, (1906) 2 K. B. 119.

Where under a statutory reference the arbitrator decided that a particular 232 square yards could not be severed without material detriment to the whole property and awarded compensation on the footing that the Railway Company was bound to acquire the whole premises, it was held that until the award was set aside by adopting the proper procedure, the Court had no power to review the award : *Caledonian Rail Co.* v. *Turcan*, (1898) A. C. 256.

It is not understood why sub-secs. (*2*) and (*3*) of sec. 6 have not been mentioned in sec. 46 thus effecting a departure from the English Act of 1934.

The Indian Arbitration Act, 1940, provides by sec. 46 :—"The provisions of this Act except sub-sec. (*1*) of secs. 6 and sec. 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder."

It will be noticed that secs. 42, 43 and 44 are not excluded from statutory arbitrations. Sec. 42 deals with service of notice by a party or an arbitrator and the complications and technicalities of substituted service have been avoided.

Sec. 43 defines the powers of the Court to issue processes etc. and following the Second Schedule of the Civil Procedure Code has filled up the lacuna in the Indian Arbitration Act, 1899, which had no provision in this behalf. Sec. 44 enables the High Court to make rules consistent with the Act as to the filing of awards, for the filing and hearing special cases, the staying of proceedings, the forms to be used for the purposes of the Act, and generally, as to all proceedings in Court under the Act.

Sec. 47 provides that "subject to the provisions of sec. 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and all proceedings thereunder :

"Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as

a compromise or adjustment of a suit by any Court before which the suit is pending."

The conflict between the different High Courts on the question whether in a pending suit reference to arbitration without the order of the Court coupled with an award amount to an adjustment or compromise of the suit has already been touched upon.

If the Legislature intended to accept the view of the Bombay, Madras and Allahabad High Courts, then I am afraid, that result has not been fully achieved. According to those High Courts the award amounted to an adjustment within the meaning of Or. 23, r. 3 of the Civil Procedure Code, 1908. If this is accepted, then on a party denying the adjustment, the Court has to find whether that denial is correct. A party by a false denial cannot get rid of an adjustment, but as the proviso to sec. 47 has been drawn up, the award may only be considered with "the consent of all the parties interested".

Further, under Or. 23, r. 3, if an adjustment is proved, the Court shall order the adjustment to be recorded, but under sec. 47, the Court 'may' take such adjustment into consideration.

The result is that the party dissatisfied with the award has only to refuse his consent for preventing the same being taken into consideration by the Court.

Pending references are saved by sec. 48, and sec. 49 repeals the whole of the Indian Arbitration Act, 1899, the whole of the Second Schedule of the Civil Procedure Code, 1908 and sec. 89, which made the Second Schedule applicable to arbitrations, and also sec. 104, sub-sec. (1) cls.

(*a*) to (*f*) dealing with appeals in connection with arbitration matters.

The provisions of other Acts which are amended are the Religious Endowments Act 1863, sec. 16, the Specific Relief Act, sec. 21, the Indian Limitation Act, First Schedule, Articles 158, 159, 178 and 179, a formal amendment of sec. 52 of the Indian Electricity Act 1910, and sec. 152 of the Indian Companies Act, 1913.

Miscellaneous Matters

The matters covered by the provisions of the Indian Arbitration Act have been discussed as also some matters not coming directly within any of its sections, but are either connected with or arise out of them. Some other matters of the latter kind established by the decisions of Courts, or from considerations of general law, are now going to be stated, namely :

I. Form and Formalities of Award

Forms and formalities of award.

Sec. 14 of the Indian Arbitration Act, 1940, requires the award to be signed, but is silent as to form in which the award should be given, which is to be expected as any form of words may be used, and no technical or legal expressions are necessary so long as the award shows the decision of the arbitrator : *Eardley* v. *Steer*, (1835) 4 Dowl. 423.

The amount allowed, however, must amount to a decision, and such a statement as "I propose that *B* should pay £10" will not amount to an award : *Lock* v. *Vulliamy*, (1833) 5 B. & Ad. 600.

Where there is a decision, if the award, instead of ordering payment, requests a party to do so, that will be a good award : *Smith* v. *Hartley*, (1851) 10 C. B. 800.

Misstatements in the award, which are immaterial and which cannot be made the foundation for attacking the award on the ground that such misstatements have led to a wrong decision, do not affect the validity of the award, for example, misstatement as to the date when time was enlarged, it appearing from such misstatement that the arbitrator had been *functus officio* on that date : *In re Lloyd and Spittle*, (1849) 6 D. & L. 531 ; misstatement as to the number of arbitrators signing the award : *White* v. *Sharp*, (1844) 12 M. and W. 712.

A misstatement as to the extent of the subject-matter may be immaterial : *Paull* v. *Paull*, (1833) 3 L. J. (S. S.) Ex. 11, but the arbitrator cannot by a wrong recital clothe himself with jurisdiction over matters not included in the submission : *Price* v. *Popkin*, (1839) 10 A. & E. 139.

It is unnecessary to have recitals of the matters in dispute : *Smith* v. *Hartley*, (1851) 10 C. B. 800. Even where the submission required a view of the premises before arbitration proceedings, the omission of any recital in that behalf is immaterial : *Spence* v. *Eastern Counties Rail Co.*, (1839) 7 Dowl. 679. Indeed, an award merely stating that the arbitrator finds that Rs. 100/- is due from *A* to *B* ought to be sufficient : *Whitehead* v. *Tattersall*, (1834) 1 A. & E. 491.

II. Directions which may be contained in Award

(*a*) The award cannot direct any act to be done which will involve a party in committing an illegal act, for example, trespass or waste : *Turner* v. *Swainson*, (1836) 1 M. and W. 572.

Directions which may be contained in award.

The award when ordering payment of money may fix instalments, and may direct that, if a named sum is not paid within a stated date, a larger amount will be payable, and though express authority for this proposition is a very archaic report, namely, *Kockill* v. *Witherell*, (1672) 2 Keb. 838, it is quite in conformity with general principles which have been applied to awards.

(*b*) An award cannot order restitution of conjugal rights : *Musammat Kalabati* v. *Prabhu Dayal*, 45 I. C. 163 ; *Malka* v. *Sardar*, A. I. R. (1929) Lah. 394.

(*c*) An award cannot alter devolution of property in a mode different from ordinary principles of law. It cannot make property, which is divisible under law, indivisible for ever : *Musst. Jafri Begum* v. *Syed Ali Reza*, 5 C.W.N. 585 P. C.

(*d*) Directions beyond the powers given by the arbitration agreement. No award can direct a thing to be done or action taken,which does not come within the powers express or implied given to the arbitrator by the terms of the arbitration agreement, for example, where the submission is for deciding the question whether a party is bound to accept certain goods as being in terms of the contract and power is given to the arbitrator to make the customary allowance, the award cannot direct acceptance of the goods at a value less than the contract-price reduced by customary allowances : *Hooper* v. *Balfour*, (1890) 62 L. T. 646.

Again, when the arbitrator is asked to decide whether fixtures removed by the landlord were

part of the house let out, the award could not direct the tenant to replace the fixtures at the cost of the landlord : *Price* v. *Popkin*, (1839) 10 A. & E. 139.

It is unnecessary to multiply further illustrations as the authority of the arbitrator for giving special directions must in each case depend on the construction of the arbitration agreement. Thus whether the arbitrator can order dissolution of partnership and order return of premium will depend on the terms of the submission. Where the submission included questions of construction of the articles, and "any division act or thing to be made or done in pursuance thereof, or to any other matter or thing relating to the said partnership or the affairs thereof, and it was contended on the strength of cases, like, *Joplin* v. *Postlewaite*, (1890) 61 L. T. 629 (C. A.) and *Tattersall* v. *Groote*, (1800) 2 Bos. & P. 131, that an order for return of premium would be beyond the power of the arbitrator. But Stirling, J., in negativing the contention, said :—"It was admitted that the clause cannot be distinguished from that which formed the subject of decision in *Russell* v. *Russell*, 14 Ch. D. 471 and *Walmsley* v. *White*, 40 W. R. 675.

"On principle, it seems to me that if the arbitrators have power to award a dissolution they must also have power to award the terms on which the dissolution is to take place, and that these terms are, no less than the dissolution itself, 'matters or things relating to the said partnership or the affairs thereof'. And if they have power to take into consideration the terms

of the dissolution, they must also have power to consider whether the return of the whole or part of the premium should form one of those terms": *Belfield* v. *Bourne*, (1894) 1 Ch. 521 at p. 524.

III. Effect of Award as Judgment, Evidentiary Value of Award and Action on Award

Effect of award as judgment, evidentiary value of award and action on award.

An award is final and conclusive as between parties on all matters referred by the submission. Thus where an award had fixed the amount payable as damages for breach of a covenant, it was held to be conclusive in an action on the covenant for recovering damages: *Whitehead* v. *Tattersall*, (1834) 1 A. & E. 491; *Commings* v. *Heard*, (1869) 39 L. J. Q. B. 9.

The effect of an award in establishing a legal right has been laid down in *Imperial Gas Light and Coke Co.* v. *Broadbent*, (1859) 7 H.L.C. 600, a case which has been referred to in innumerable later cases, some of the recent cases being *Saunby* v. *London (Ontario) Water Commissioners*, (1906) A. C. 110 P. C., *A. G.* v. *Birmingham etc. Drainage Board*, (1910) 1 Ch. 48; and *Wood* v. *Conway Corporation*, (1914) 2 Ch. 47. The principle laid down in the last case mentioned above is that if plaintiff applies for an injunction in respect of a violation of a Common Law right, and the existence of that right or the fact of its violation is denied, he must establish his right at law, but having done that, he is, except in special circumstances, entitled to an injunction to prevent a recurrence of that violation. For such a purpose the award of an arbitrator is equivalent to a verdict.

The award, however, is not admissible as evidence against strangers, even in a matter in which hearsay evidence is admissible : *Evans* v. *Rees*, (1839) 10 A. E. 151. On this principle an award against the principal debtor is not admissible against his surety : *Exparte Young*, (1881) 17 Ch. D. 688. This proposition is not open to doubt, but a stranger against whom an award is not admissible may make it evidence against him by his subsequent conduct : *Taylor* v. *Parry*, (1840) 1 M. & G. 604 at p. 621 ; and in some cases a stranger may rely on an award as evidence in his favour, for example, in mitigation of damages : *Shelling* v. *Farmer*, (1726) 1 Stra. 646.

In an action based on the award, it has to be noticed that in such action the facts found by the award cannot be disputed.

The award is conclusive not only as regards findings of facts, but also where the construction of a contract has been submitted to arbitration, the construction put on it in the award is conclusive is a subsequent action between the same parties for other branches of the same contract, *Gueret* v. *Audouy*, (1893) 62 L. J. Q. B. 633 (C. A.)

Can an award between two parties (for example, on claim by a diver for personal injuries from a steamer of the opposite party) prevent a party from proceeding *in rem* in the Court of Admiralty ? This was answered in the negative in *The 'Sylph'*, (1867) 37 L. J. Adm. 14.

In this case in the arbitration clause there was a provision to the effect that, in case the award should not be performed by the defendants

all the plaintiff's right should be reserved, but as pointed out in *Russell on Arbitration and Award*, 13th. Ed. p. 418 : "It seems that the decision would have been the same had there been no reservation of the plaintiff's rights".

The defendant cannot plead, as a defence, corruption or misconduct of the arbitrators, at least, where an application might have been made for setting aside the award : *Wills* v. *Maccarmick*, (1762) 2 Wils 148 ; *Braddick* v. *Thompson*, (1807) 8 East. 344 ; *Brazier* v. *Bryant*, (1825) 3 Bing. 167 ; *Glazebrook* v. *Davies*, (1826) 5 B. and C. 534 ; *Whitmore* v. *Smith*, (1861) 7 H. and N. 509. That one of the parties had no opportunity of being heard will come within the above rule : *Thorburn* v. *Barnes* (1867) L. R. 2 C. P. 384.

A case which went up to the Privy Council from Madras, namely, *Oppenheim and Co.* v. *Mahomed Haneef*, (1922) 1 A. C. 482, requires attention. The action was brought on an award made in London, parties being bound by their agreement to have the arbitration in England. One of the defences was that the defendant had no notice of the arbitration proceedings in England. The trial Judge, Coutts Trotter, J., following *Thorburn* v. *Barnes*, held that such a defence could not be taken in an action on the award. On appeal, the Court held that *Thoburn* v. *Barnes* had no application in India.

On appeal from this judgment to the Privy Council, it was held that Coutts Trotter, J. was right, and it was further stated : "Under that law, by which both parties agreed to be bound, any objection to an award on the ground of

misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on the award."

Their Lordships found it unnecessary to express any opinion on the Indian Law, but there can be no doubt that the Indian Law is not different, as will appear from *John Batt and Co.* v. *Kanoolal* in 53 Cal. 65.

Even where the misconduct of the arbitrator is evident and sufficient for having the award set aside, the same would not be a good defence on an action on the award—a principle established by decisions to which reference has been made above.

It will be a good plea that the submission was revoked before the award : *Marsh* v. *Bulteel*, (1822) 5 B. and A. 507, or that the arbitrator has exceeded his jurisdiction : *Buccleuch* (*Duke*) v. *Metropolitan Board of Works*, (1868) L. R. 3 Exch. 306 at p. 321 ; *Bhaurao* v. *Radhabai*, 33 Bom. 401.

The defendant could successfully take the plea that there was no concluded contract, and, consequently, there was no effective arbitration clause : *Rughnath Das* v. *Sulzer Bruderer*, 7 Lah. 42 and *Fardunji* v. *Jamsedji*, 28 Bom. 1.

Many of the Indian rulings may have to be reconsidered having regard to sec. 33 of the Indian Arbitration Act, 1940, which provides that any party "desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court..."

Criticism has been made in Lecture VIII on the language of secs. 32 and 33, and it is submitted that a very unsatisfactory condition has been created by including 'effect' of arbitration agreement or award within those two sections. Question about the 'effect' of an award may arise in various unforeseen ways, and it may well be that the matter of the 'effect' of the award is raised not in the plaint, but in a written statement. It seems absurd to contend that the defendant will be precluded from relying on the 'effect' of the award, because he has not applied under sec. 33, but the language used is open to that interpolation.

Specific performance of award.

IV. *Specific Performance of Awards.*—An award can be filed under the provisions of the Civil Procedure Codes of 1882 and 1908, Second Schedule, as also under the Indian Arbitration Act, 1899, but that is not the exclusive remedy.

In *Gopi Reddi* v. *Mahanandi Reddi*, 15 Mad. 99, the award not being available, the plaintiff brought his action on the award for partition of the family property, but the lower Court dismissed the suit. On appeal the High Court said :— "The District Judge is clearly in error in supposing that no suit will lie upon an award. Sec. 525, Civil Procedure Code, only provides that a party *may* apply to the Court to have an award filed ; this is no bar to his right to sue upon the award, and, if the award cannot be produced, secondary evidence of its contents will be admissible on proof of its loss" ; see also *Sabbaraya Chetti* v. *Sadasiva Chetti*, 20 Mad. 490.

In *Musst. Jafri Begum* v. *Syed Ali Raza*, 5 C. W. N. 585 P. C. the plaintiff filed her suit for

partition on the basis of an award, but claimed to get rid of an unauthorised addition to the award and asked for a declaration that one of the clauses was *ultra vires* and invalid. The Privy Council held that such a suit based on the award was permissible.

Sec. 30 of the Specific Relief Act of 1877 provides that the provisions of Chapter II (of the Specific Performance of Contracts) shall, *mutatis mutandis*, apply to awards. Consequently, in a case for specific performance of an award, the Court will consider whether, if the terms of the award had been contained in a contract between the parties to the submission, such a contract would be one of which specific performance ought to be decreed : *Kuldip Dube* v. *Mahaul Dube*, 34 All. 43.

Limitation—There is no specific Article in the Limitation Act for a suit for the enforcement of an award, Art. 46 being confined to awards under certain Bengal Regulations. Consequently Art. 120 applies to such a suit : *Rajmal* v. *Maruti*, 45 Bom. 329 ; *Nanalal* v. *Chhotalal*, 49 Bom. 693.

V. *Judge as Arbitrator.*—In *Burgess* v. *Morton*, (1896) A. C. 136, the parties stated a special case raising only questions of facts and none of law. It was held that the decision of the Judge was in the nature of an award and not appealable. The other notable important English case is *In re Durham County Permanent Building Society*, (1871) L. R. 7 Ch. 45. Judge as arbitrator.

A very interesting case is *Baijnath* v. *Dhaniram*, 51 All. 903. The parties agreed to abide

by the decision of the trying Munsiff to be given on inspection of documents and the locality. On judgment being given, one of the parties applied for review of the judgment. The Allahabad High Court held that the Munsiff had a two-fold capacity, namely, Court and arbitrator, and that as the Court, he should remit to himself as the arbitrator his own award if anything was left undecided. This decision is difficult to reconcile with *Baikantha Nath Goswami* v. *Sitanath Goswami*, 38 Cal. 421.

In another Calcutta case, *Kumar Saradindu Roy* v. *Bhagwati Debya Chowdhurani*, 10 C. W. N. 835, the parties during the course of the suit agreed that the Court should decide the question of title on the basis of the *Thak* map. It was held that in giving the decision the Court acted as arbitrator and no appeal lay from it. But the intention of the parties to constitute the Judge as the arbitrator must be clear, express and unequivocal (*per* Schwabe, C. J. in *Sankaranarayana* v. *Ramaswamiah*, 47 Mad. 39).

Award containing finding as to custom.

VI. *Award containing a Finding as to Custom.*—In several cases, like, *Hutcheson* v. *Eaton*, (1884) 13 Q. B. D. 861, it was held that the arbitrators had no power to decide whether a custom existed or not, on the ground that whether a custom was to be added to the written contract was not in dispute arising out of the contract. These cases were overruled by *Produce Brokers Co.* v. *Olympia Oil and Cake Co.*, (1916) 1 A. C. 314, on the ground that where the arbitrator has power to decide all disputes arising out of a contract, he must decide what the contract is,

inasmuch as he cannot decide that without introducing the custom.

A custom inconsistent with the terms of the contract cannot affect the rights and liabilities of the party thereto, and reliance in the award on such a custom will disclose an error apparent on the face of the award.

Award dealing with matters arising after date of arbitration agreement.

VII. *Award dealing with matters arising after the date of Arbitration Agreement.*—The agreement may empower the arbitrator to deal with claims subsequently arising or with contingent claims, as *In re Brown and Croydon Canal Co.*, (1839) 9 A. and E. 522 ; *Lewis* v. *Rossiter*, (1875) 44 L. J. Ex. 136, but in the absence of such power on a reference of all matters in difference, the arbitrator cannot deal with claims or damages or demands of money becoming due after the date of the arbitration agreement : *In re Brown and Croydon Canal Co.*, (1839) 9 A. & E. 522.

The power to award damages for period subsequent to the date of the arbitration agreement may be given by implication, and, consequently, an arbitrator required to settle the price to be paid by a railway company for lands taken by them, who were in possession of them for some years, was held entitled to award mesne profits up to the time of making his award : *Smalley* v. *Blackburn Railway Co.*, (1857) 2 H. and N. 158.

LECTURE XII

LEGAL PROCEEDINGS ON ARBITRATION AND FOREIGN AWARDS

The law on the subject has been codified in sec. 35 of the Indian Arbitration Act, 1940 :—

"35. (*1*) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole subject-matter of the reference has been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under sec. 34, be invalid.

Effect of legal proceedings on arbitration codified in sec. 35.

(*2*) In this section the expression 'parties to the reference' includes "any person claiming under any of the parties and litigating under the same title."

Reference has already been made to *Doleman's* case, (1912) 3 K. B. 257, for the proposition that when a suit is commenced, even if reference to arbitration under the arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed. This principle has been followed in many Indian cases, for example, *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain*, 47 Cal. 752, where the matter has been fully explained by Mookerjee, J.

"Mr. Justice Greaves has granted that application", (*i. e.* to set aside the award) "on the

ground that where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect unless the suit has been stayed pending the arbitration." In support of this view reliance has been placed upon the decision of the majority of the Court of Appeal in *Doleman and Sons* v. *Ossett Corporation*, (1912) 3 K. B. 257, which has been applied in this country in *Dinabandhu Jana* v. *Durgaprasad Jana*, 46 Cal. 1041, and *Appavu Rowther* v. *Seeni Rowther*, 41 Mad. 115."

"In *Doleman and Sons* v. *Ossett Corporation*, *Fletcher Moulton*, L. J., explained the position of the parties, when notwithstanding an arbitration clause in the contract between them, a suit has been instituted by one of them. The law will not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, has the power, in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of Law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows that, in the latter case, the private tribunal, if it has ever come into existence is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration and that the action itself shall be referred" (at pp. 755, 756).

Private tribunal to become *functus officio* requires three conditions.

On reference to sec. 35, it will be seen that the private tribunal does not become *functus officio* by the mere fact of the institution of the suit, as the section requires three conditions to be fulfilled, namely,—

(*1*) Notice must be given of institution of proceedings to the arbitrators or umpire ;

(*2*) Such legal proceedings must be upon the whole of the subject-matter of reference ; and

(*3*) The proceedings must be between all the parties to the reference.

Before the passing of the Indian Arbitration Act, 1940, the Indian High Courts had decided to follow *Doleman's* case, (1912) 3 K. B. 257, as has already appeared from the quotation from the judgment of Mookerjee, J. in *Ramprosad* v. *Mohanlal*, 47 Cal. 752 ; and in *Jokiram* v. *Ghaneshamdas*, 47 Cal. 849, after the award had been set aside on the ground that the arbitrators had become *functus officio* by reason of the suit, which was instituted after the arbitration proceedings had advanced considerably, the Court stayed the suit thus compelling the parties to go before the arbitrators ; see also *Sukhnath* v. *Nehalchand*, 42 All. 661.

It is submitted that sec. 35 of the Indian Arbitration Act, 1940, will lead to difficulties which, probably, have not been contemplated by the Legislature.

To take a concrete case :—*A* claims three sums of Rs. 500/-, Rs. 1000/- and Rs. 2000/- respectively from *B* before the arbitrators. The "whole of the subject-matter of the reference", to quote the language of sec. 35, consists of the three claims. After arbitration proceedings have

advanced *A* agrees that his claim for Rs. 500/- is untenable or accepts, say, Rs. 250/- in full settlement of his claim, while the dispute as to the second and third claims are still pending before the arbitrators. *A* institutes a suit, but it cannot obviously include the first claim. Is it not possible to contend reasonably that inasmuch as the suit does not relate to "the whole of the subject-matter of the reference", sec. 35 is not attracted, and consequently, the arbitrators are not *functus officio*?

Again, sec. 35 contemplates legal proceedings between all the parties. The arbitration proceedings may have started between *A*, *B*, and *C*, but during the hearing before the arbitrators, *C* is completely exonerated and the proceedings continue between *A* and *B* only. Before the arbitrators make their award *A* starts legal proceedings against *B* only. Such a suit cannot be covered by the words "legal proceedings between all the parties", and if, therefore, sec. 35 is not attracted, can the dispute between *A* and *B*, be competently decided both by the Court and the arbitrators?

The situation may be met in some cases by what is contemplated by sec. 35, namely, by grant of stay of proceedings under sec. 34; but it is quite easy to imagine that circumstances may exist by reason whereof the Court may refuse stay on the ground that all the conditions necessary for grant of the stay under sec. 34 do exist.

Sec. 35 has, no doubt, been drafted to codify the law as laid down in *Doleman's* case, (1912) 3 K. B. 257 and authorities which have followed that case, but it does not appear that the con-

ditions involved in "whole of the subject-matter of the reference" and "legal proceedings between all the parties to the reference" have been included in the basis of these decisions.

The next section, that is, sec. 36 gives power to the Court, where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

LIMITATION

Sub-sec. (*4*) of sec. 37 has already been dealt with in connection with arbitration agreements which provide that claims shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed within a fixed time.

Sub-sec. (*1*) makes the Indian Limitation Act, 1908, applicable to arbitrations and thus renders unnecessary the discussion of authorities bearing on the question whether arbitrators are bound to take notice of the plea of limitation.

Similarly sub-sec. (*2*) renders it unnecessary to refer to authorities which discuss the starting point of limitation, where the term in the arbitration agreement provides that 'no cause of action shall accrue' until award is made, as the sub-section provides that 'the cause of action shall be deemed...to have accrued in respect of any such matter at the time when it would have accrued but for that term in the argreement.

Sub-secs. (*3*) and (*5*) relating to the time when arbitration shall be deemed to have commenced for purposes of limitation and suspension of the period of limitation respectively call for

no special comments. Sec. 37 relating to limition does not apply to statutory arbitrations by reason of sec. 46.

Sec. 38 relating to the arbitrator's costs have been previously discussed and secs. 39 to 44 require no discussion beyond the references to their subject-matters which have already been made and showing how sec. 39 is a very desirable provision.

Sec. 39 lays down what orders are applicable and the mass of authorities on this matter are of no importance now, and, indeed, some of them have been overruled by the present provision.

Does an appeal lie from an award based on an invalid order of reference and a decree passed thereon ? The Calcutta High Court held that an appeal did lie, whereas the Bombay, Madras, Lahore, Patna and Allahabad High Courts answered the question in the negative.

Again the Calcutta, Bombay and Madras High Courts decided that although no appeal lay from an order setting aside an award under the provisions of the Second Schedule, Civil Procedure Code, 1908, the propriety of such an order could be agitated on appeal from the decree ultimately passed in the suit. But the Allahabad High Court maintained a contrary view.

Further the High Courts of Calcutta, Bombay, Madras and Lahore have ruled that an order not appealable under sec. 104, Civil Procedure Code, 1908, may yet be appealable under the provisions of the Letters Patent. It is not intended to follow the long vista thrown open by these very numerous conflicting decisions.

Sec. 39 has simplified the matter by substantially applying sec. 104, Civil Procedure Code, 1908, to arbitration proceedings and by making an order refusing to set aside an award or setting it aside appealable.

The use of the words "and from no others' clarifies the situation and renders inapplicable many of the older decisions.

Similarly decisions holding that a second appeal is allowed in certain circumstances no longer require consideration as sub-sec. (*2*) of sec. 39 provides that : "No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council."

By preventing parties from attacking orders, setting aside awards, or refusing to set them aside in appeal from final decree passed in the matter, also by providing for only 30 days for applying for setting aside an award or for getting it remitted, the Legislature has endeavoured to stop the delay and expense of litigation, which was frequent under the older law—a defect pointed out in the report of the Civil Justice Committee which met in 1924-1925.

Sec. 40 provides for a Small Cause Court having no jurisdiction over arbitrations save in arbitrations in suits before it.

Sec. 41 relates to procedure and powers of Courts. Cl. (*a*) makes the Civil Procedure Code applicable and cl. (*b*) will be dealt with under Second Schedule to which it refers.

FOREIGN AWARDS

Action in England may be stayed where condition is for dispute to be submitted to jurisdiction of foreign Court.

It has been held in England that where there is a condition for disputes being submitted to the jurisdiction of a foreign Court, an action in England on the contract may be stayed. Thus where a life insurance policy was effected in Buddapest between a foreigner and an English Insurance Company and it contained a condition whereby the parties agreed to all disputes being submitted to the jurisdiction of the Court at Buddapest, an action arising out of the contract of insurance brought in England was stayed on the ground that the condition amounted to a submission to arbitration within the meaning of sec. 4 of the Arbitration Act, 1889 : *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society*, (1903) 1 K. B. 249.

Cases where same principle accepted.

Cases where the same principle has been applied are to be found in :

The Cap Blanco, (1913) P. 130 ;

The Dawlish, (1910) P. 339 ;

Law v. *Garrett*, (1878) Ch. D. 26, and

Kirchner and Co. v. *Gruban*, (1909) 1 Ch. 413.

Bombay High Court has accepted principle of *Austrian Lloyd's* case.

The principle of the *Austrian Lloyd's* case just mentioned was followed by the Bombay High Court in *Haji Abdulla* v. *George Reginald Stamp*, 26 B. L. R. 224. In that case there was a dispute with regard to a claim on a policy of marine insurance, which provided that all disputes should be referred to England for settlement and no legal proceedings should be taken to enforce any claim except in England, where the underwriters were alone domiciled and carried on business.

But whether a clause amounts to a submission to arbitration must depend on the language used, and after discussing the English and Indian cases mentioned before, the Bombay High Court refused to follow the principle laid down in them with the following remark :—

"We think that if the clause in the bill of lading could be read as stating that all claims arising thereunder should be determined according to British Law, or should be determined in the United Kingdom, and to the exclusion of the jurisdiction of any other country, it might have been said that there was an agreement to refer any dispute for the decision of the Courts of the United Kingdom. But that is not what the clause says" : *Burjor Joshi* v. *Ellerman City Lines*, I. L. R. 49 Bom. 854 at p. 858.

The situation discussed so far and the authority dealing with it is one where parties have agreed to have their disputes settled by a foreign Court. The next matter to be considered is foreign awards.

Distinction in English Courts between foreign judgments and foreign awards.

In the English Courts a distinction has been drawn between an award which is a valid enforceable award according to the law of the foreign country concerned and an award which is invalid according to such law, or is such that it would be unenforceable without an order of the foreign Court. Thus, in *Merrifield Zieler and Co.* v. *Liverpool Cotton Association*, (1911) 105 L. T. 97, there was a contract between a German firm and an English firm, which contained a condition for reference of disputes to arbitration, but the English firm declined to submit to arbitration disputes which had arisen.

The German firm got an award in its favour in Germany according to the German law, but the award could not be enforced without an enforcement order to make it enforceable in Germany. In the suit brought in England by the English firm the German firm counterclaimed for a declaration that the award was valid and for the payment of the amount awarded. The Court, while holding that the award was a valid award, declared that it was not the judgment of a foreign tribunal, which the English Courts would recognise and enforce in an action brought on the award.

It will be noticed that the award, though binding on the parties, was not enforceable in Germany as there was no enforcement order.

Where foreign award was enforceable in foreign country.

A case in which the foreign award was enforceable in the foreign country will be found in *Norske Atlas Insurance Co. Ltd.* v. *London General Insurance Co. Ltd.*, (1927) 43 T. L. R. 541. A policy effected between an English Insurance Company and a Norwegian Insurance Company contained a condition for reference to arbitration in Norway. An award was made in Norway in favour of the Norwegian Company and a suit was instituted in England for enforcing the award. The English Company contended, and quite correctly, that though the policy was valid according to the Norwegian law, it was invalid according to the English law. But this contention was not allowed to prevail on the ground that the action was on the award, and not on the policy, and that the inference from the circumstances of the case was that the parties had agreed to the Norwegian law being

applicable to the contract. It will be seen that according to this case the fact that the claim was founded on a breach of the English law was considered immaterial.

An interesting question which arises is whether this principle will be followed in India.

Attention is drawn to sec. 13 of the Civil Procedure Code, 1908, which enumerates the cases when a foreign judgment is not conclusive and one of the case is :—"Where it sustains a claim founded on a breach of any law in force in British India" : sub-sec. (*f*) of sec. 13. The section deals with foreign judgments, and not foreign awards. But let us consider the following case. Assume that according to the law of some foreign country it is no defence to urge that the debt tried to be enforced is a gambling debt, while the position under the Indian law is just the opposite.

If there is a foreign judgment based on a gambling debt, it will be good judgment in the foreign country, but as Mulla holds "presumably a foreign judgment for a gambling debt would not be enforced in British India" : *Mulla's Civil Procedure Code*, 10th Ed., p. 98.

Position anomalous when foreign judgment unenforceable, while foreign award enforceable.

It will be indeed an anomalous position if a foreign judgment is held enforceable on the principle laid down in *Norske Atlas Insurance Co. Ltd.* v. *London General Insurance Co. Ltd.*, (1927) 43 T. L. R. 541, mentioned above.

Enforcement of foreign award statutorily provided in England.

In England statutory provision has been made for enforcement of foreign awards by the Arbitration (Foreign Awards) Act, 1930, which will be found set forth in the Appendix.

In connection with foreign awards for India statutory provision has been made by the Arbitration (Protocol and Convention) Act, 1937, which will also be found in the Appendix.

It is unnecessary to refer to its provisions or to say anything further about it beyond drawing attention to the preamble which will speak for itself, namely :—

Foreign awards made enforceable by Arbitration (Protocol and Convention) Act 1937.

"Whereas India was a state signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as Commercial under the law in force in British India ; And whereas it is expedient for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in British India, to make certain provisions respecting the law of arbitration, it is hereby enacted etc."

Enforcing of Foreign Award in England

By an action on the award brought in the English Court under Arbitration (Foreign Awards) Act, 1930, (20 Geo V. C. 15, sec. 3).

Conditions Precedent to Enforcement

Conditions precedent to such enforcement.

(1) Submission to be valid by foreign law, (2) arbitrators to be duly appointed, (3) arbitration to be good in foreign law, (4) award to be final, (5) capability of reference at English Law and (6) not to be contrary to public policy of the law of England.

Enforcement of Foreign Award in India

Under sec. 4 of Act VI of 1937, a foreign award shall be "enforceable in British India as if it were an award made on a matter referred to arbitration in British India".

Provision is made for stay of proceedings in respect of matters to be referred to arbitration, if the matter has been covered by the First Schedule to Act VI of 1937.

Conditions for enforcement of foreign award in India.

A foreign award can be filed in Court under section 7 of Act VI of 1937, and such a foreign award can be enforced in British India, if the award is—

(*a*) made in pursuance of an agreement for arbitration valid under the law by which it was governed ;

(*b*) has been made by the tribunal provided for in the agreement ;

(*c*) has been made in conformity with law governing the arbitration procedure ;

(*d*) has become final in the country in which it was made ;

(*e*) has been in respect of matter which may lawfully be referred to arbitration under the law in British India ;

(*f*) is not contrary to the public policy or the law of British India (sec. 6).

APPENDIX A

The Code of Civil Procedure (Act XIV) of 1882

Secs. 506—526

PART V

OF SPECIAL PROCEEDINGS

CHAPTER XXXVII

Reference to Arbitration

506. If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply, in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.

Parties to suit may apply for order of reference.

Every such application shall be in writing, and shall state the particular matter sought to be referred.

507. The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

Nomination of arbitrator

If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.

When Court to nominate arbitrator.

508. The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as

Order of reference.

it thinks reasonable for the delivery of the award, and specify such time in the order.

When once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as hereinafter provided.

When reference is to two or more, order to provide for difference of opinion.

509. If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators,

(*a*) by the appointment of an umpire, or

(*b*) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree, or

(*c*) by empowering the arbitrators to appoint an umpire, or

(*d*) otherwise, as may be agreed between the parties ; or, if they cannot agree, as the Court determines.

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

Death, incapacity, &c., of arbitrators or umpire.

510. If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may, in its discretion, either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.

511. When the arbitrators are empowered by the order of reference to appoint an umpire,

and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire ; and if, within seven days after such notice has been served, or such further time as the Court may in each case allow, no umpire be appointed, the Court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

Appointment of umpire by Court.

512. Every arbitrator or umpire appointed under section 509, section 510, or section 511, shall have the like powers as if his name had been inserted in the order of reference.

Powers of arbitrator or umpire appointed under secs. 509, 510, 511.

513. The Court shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire or desires to examine, as the Court may issue in suits tried before it.

Summoning witnesses.

Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties, and punishments, by order of the Court, on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Punishment for default, &c.

514. If, from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either grant a further time, and from time to time enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the suit.

Extension of time for making award.

Supersession of arbitration.

When umpire may arbitrate in lieu of arbitrators.

515. When an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) when they have delivered to the Court or to the umpire a notice in writing, stating that they cannot agree.

Award to be signed and filed.

516. When an award in a suit has been made, the persons who made it shall sign it, and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

Arbitrators or umpire may state special case.

517. Upon any reference by an order of the Court, the arbitrators or umpire may, with the consent of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court ; and the Court shall deliver its opinion thereon ; and such opinion shall be added to, and form part of, the award.

Court may, on application, modify or correct award in certain cases.

518. The Court may, by order, modify or correct an award—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part, and does not affect the decision on the matter referred, or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

Order as to costs of arbitration.

519. The Court may also make such order as it thinks fit respecting the costs of the arbitration, if any question arise respecting such

costs, and the award contain no sufficient provision concerning them.

When award or matter referred to arbitration may be remitted.

520. The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrators or umpire, upon such terms as it thinks fit,

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration ;

(*b*) where the award is so indefinite as to be incapable of execution ;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

Grounds for setting aside award.

521. An award remitted under section 520 becomes void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely) :—

(*a*) corruption or misconduct of the arbitrator or umpire ;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit ;

and no award shall be valid unless made within the period allowed by the Court.

Judgment to be according to award.

522. If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if no application has been made to set aside the

award, or if the Court has refused such application,

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given, a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Decree to follow.

523. When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

Agreement to refer to arbitration may be filed in Court.

The application shall be in writing, and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

Application to be numbered and registered.

On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

Notice to show cause against filing.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and may also nominate the arbitrator, when he is not named therein and the parties cannot agree as to the nomination.

Provisions of chapter applicable to proceedings under order of reference.

524. The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under section 523, and to the award of arbitration and to the enforcement of the decree founded thereupon.

Filing award in matter referred to arbitration without intervention of Court.

525. When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates that the award be filed in Court.

Application to be numbered and registered.

The application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Notice to parties to arbitration.

The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Filing and enforcement of such award.

526. If no ground, such as is mentioned or referred to in section 520, or section 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.

APPENDIX B

The Code of Civil Procedure, 1908

THE SECOND SCHEDULE

ARBITRATION

Arbitration in Suits

Parties to suit may apply for order of reference.

1. (*1*) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(*2*) Every such application shall be in writing, and shall state the matter sought to be referred.

Appointment of arbitrator.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Order of reference.

3. (*1*) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(*2*) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

Where reference is to two or more,

4. (*1*) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

order to provide for difference of opinion.

(*a*) by the appointment of an umpire ; or

(*b*) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail ; or

(*c*) by empowering the arbitrators to appoint an umpire ; or

(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(*2*) Where an umpire is appointed, the Court shall fix such time at it thinks reasonable for the making of his award in case he is required to act.

Power of Court to appoint arbitrator in certain cases.

5. (*1*) In any of the following cases, namely :—

(*a*) Where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

(*b*) where an arbitrator umpire—

(*i*) dies, or

(*ii*) refuses or neglects to act, or becomes incapable of acting, or

(*iii*) leaves British India in circumstances showing that he will probably not return at an early date, or

(*c*) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may

be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

6. Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Summoning witnesses and default.

7. (1) The Court shall issue the same process to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties, and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Extension of time for making award.

8. Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time

time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period ; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

Where umpire may arbitrate in lieu of arbitrators.

9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

Award to be signed and filed.

10. Where an award in a suit has been made, the persons who made it shall sign it, and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

Statement of special case by arbitrators or umpire.

11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Power to modify or correct award.

12. The Court may, by order, modify or correct an award,—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration, and such part can be separated from the other part and does

not affect the decision on the matter referred ; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decisions ; or

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Order as to costs of arbitration.

13. The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Where award or matter referred to arbitration may be remitted.

14. The Court may remit the award or any matter referred to arbitration to the re-consideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred ;

(*b*) where the award is so indefinite as to be incapable of execution ;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

Grounds for setting aside award.

15. (*1*) An award remitted under paragraph 14 becomes void on failure of the arbitrator umpire to re-consider it. But no award shall be set aside except on one of the following grounds, namely :—

(*a*) corruption or misconduct of the arbitrator or umpire ;

(*b*) either party having been guilty of fradulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(*2*) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration, and in such case shall proceed with the suit.

Judgment to be according to award.

16. (*1*) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(*2*) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Order of reference on agreements to refer.

Application to file in Court agreement to refer to arbitration.

17. (*1*) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having

jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(*2*) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(*3*) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(*4*) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

Stay of suit where there is an agreement to refer to arbitration.

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, apply to the Court to stay the suit ; and

the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

19. The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Provisions applicable to proceedings under paragraph 17.

Arbitration without the Intervention of a Court.

20. (*1*) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

(*2*) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(*3*) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

21. (*1*) Where the Court is satisfied that the matter has been referred to arbitration, and that an award has been made thereon, and where

Filing and enforcement of such award.

no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed, and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply.

Forms.

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

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APPENDIX C

THE INDIAN ARBITRATION ACT, 1899

ACT No. IX of 1899

[*3rd March, 1899*]

An Act to amend the Law relating to Arbitration

(As modified up to 1st September, 1932)

Whereas it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice ; It is hereby enacted as follows :— Preamble.

1. (*1*) This Act may be called the Indian Arbitration Act, 1899. Short title, extent and commencement.

(*2*) It extends to the whole of British India ; and

(*3*) It shall come into force on the first day of July, 1899.

2. Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town : Application.

Provided that the Local Government..... may, by notification in the local official Gazette, declare this Act applicable in any other local area as if it were a Presidency-town.

3. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, and section 523 to 526 of the Code of Civil Procedure shall not apply to any submission or arbitration to which Exclusion of certain enactments in certain cases where Act applies.

the provisions of this Act for the time being apply :

Provided that nothing in this Act shall affect any arbitration pending in a Presidency-town at the commencement of this Act or in any local area at the date of the application thereto of this Act as aforesaid, but shall apply to every arbitration commenced after the commencement of this Act or the date of the application thereof, as the case may be, under any agreement or order previously made.

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "the Court" means, in the Presidency towns, the High Court, and, elsewhere, the Court of the District Judge; and

(*b*) "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Submission to be irrevocable except by leave of Court.

5. A submission, unless a different intention is expressed therein, shall be irrevocable, except by leave of the Court.

Provisions implied in submissions.

6. A submission, unless a different intention is expressed therein, shall be deemed, to include the provisions set forth in the first schedule, in so far as they are applicable to the reference under submission.

Reference to arbitrator to be appointed by third person.

7. The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

Such person may be designated either by name or as the holder for the time being of any office or appointment.

Illustration.

The parties to a submission may agree that any dispute arising between them in respect of the subject-matter of the submission shall be referred to an arbitrator to be appointed by the Bengal Chamber of Commerce, or, as the case may be, to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce.

Power for the Court in certain cases to appoint an arbitrator, umpire or third arbitrator.

8. (*1*) In any of the following cases :—

(*a*) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator ;

(*b*) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy ;

(*c*) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him ;

(*d*) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy ;

and party may serve the other parties or the

arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties in certain cases to supply vacancy.

9. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein,—

(*a*) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies or is removed, the party who appointed him may appoint a new arbitrator in his place ;

(*b*) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent ;

Provided that the Court may set aside any appointment made in pursuance of clause (*b*) of this section.

10. The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein,—

Power of arbitrator.

(*a*) have power to administer oaths to the parties and witnesses appearing :

(*b*) have power to state a special case for the opinion of the Court on any question of law involved ; and

(*c*) have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Award to be signed and filed.

11. (*1*) When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award.

(*2*) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court ; and notice of the filing shall be given to the parties by the arbitrators or umpire.

(*3*) Where the arbitrators or umpire state a special case under section 10, clause (*b*), the Court shall deliver its opinion thereon ; and such opinion shall be added to, and shall form part of, the award.

Power for Court to enlarge time for making award.

12. The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

Power to remit award.

13. (*1*) The Court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.

(*2*) Where an award is remitted under sub-section (*1*), the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting award.

Power to set aside award.

14. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.

Award when filed to be enforceable as a decree.

15. (*1*) An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.

(*2*) An award may be conditional or in the alternative.

Illustration.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000, the said sum to be reduced to Rs. 5 if the ring is returned within fourteen days.

Power to remove arbitrator or umpire.

16. Where an arbitrator or umpire has misconducted himself, the Court may remove him.

Costs.

17. Any order made by the Court under this Act may be made on such terms as to costs or otherwise as the Court thinks fit.

18. The forms set forth in the second schedule, or forms similar thereto, with such variations as the circumstances of each case require, may be used for the respective purposes there mentioned, and, if used, shall not be called in question. Forms.

19. Whether any party to a submission to to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings ; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings. Power to stay proceedings whether there is a submission.

20. The High Court may make rules consistent with this Act as to— Power for High Court to make rules.

(*a*) the filing of awards and all proceedings consequent thereon or incidental thereto ;

(*b*) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto :

(*c*) the transfer to Presidency Courts of Small Causes for execution of awards

filed, where the sum awarded does not exceed two thousand rupees;

(*d*) the staying of any suit or proceeding in contravention of submission to arbitration; and,

(*e*) generally, all proceedings in Court under this Act.

Amendment of section 21, Act I, 1877.

21. In section 21 of the Specific Relief Act, 1877, after the words "Code of Civil Procedure" the words and figures "and the Indian Arbitration Act, 1899," shall be inserted, and for the words "a controversy" the words "present or future differences" shall be substituted.

Crown to be bound.

22. The provisions of this Act shall be binding on the Crown.

Special provision as to application of Act to Rangoon.

23. (*1*) This Act shall apply within the local limits of the ordinary civil jurisdiction of the High Court of Judicature at Rangoon in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted within those local limits.

(*2*) For the purpose of this Act, the local limits aforesaid shall be deemed to be a Presidency-town.

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APPENDIX D

THE ARBITRATION ACT, 1940

ACT No. X of 1940

Passed by the Governor-General of India in Council

(Received the assent of His Excellency the Governor-General on the 11th March, 1940)

An Act to consolidate and amend the Law relating to Arbitration.

Whereas it is expedient to consolidate and amend the law relating to arbitration in British India:

It is hereby enacted as follows :—

CHAPTER I

Introductory

Short title, extent and commencement.

1. (*1*) This Act may be called the Arbitration Act, 1940.

(*2*) It extends to the whole of British India.

(*3*) It shall come into force on the 1st day of July, 1940.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,

(*a*) "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

(*b*) "award" means an arbitration award ;

(*c*) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court ;

(*d*) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting ;

(*e*) "reference" means a reference to arbitration.

CHAPTER II

Arbitration without Intervention of a Court

Provisions implied in arbitration agreement.

3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

Agreement that arbitrators be appointed by third party.

4. The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

5. The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

Authority of appointed arbitrator or umpire irrevocable except by leave of Court.

6. (*1*) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

Arbitration agreement not to be discharged by death of party thereto.

(*2*) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(*3*) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

7. (*1*) Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

Provisions in case of insolvency.

(*2*) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (*1*) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdic-

tion in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

Power of Court to appoint arbitrator or umpire.

8. (1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments ; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy ; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him ;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said

notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.

9. Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,—

(*a*) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place ;

(*b*) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court may set aside any appointment as sole arbitrator made under clause

(*b*) add either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

Provisions as to appointment of three or more arbitrators.

10. (*1*) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(*2*) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (*1*), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(*3*) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

Power to Court to remove arbitrators or umpire in

11. (*1*) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch

in entering on and proceeding with the reference and making an award. certain circumstances.

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

12. (1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies. Power of Court where arbitrator is removed or his authority revoked.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(*3*) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

Powers of arbitrator.

13. The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to—

(*a*) administer oath to the parties and witnesses appearing ;

(*b*) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court ;

(*c*) make the award conditional or in the alternative ;

(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission ;

(*e*) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

Award to be signed and filed.

14. (*1*) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(*2*) The arbitrators or umpire shall, at the request of any party to the arbitration agree-

ment or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (*b*) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

Power of Court to modify award.

15. The Court may by order modify or correct an award—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ;

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Power of remit award.

16. (*1*) The Court may from time to time remit the award or any matter referred to arbitra-

tion to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—

(*a*) where the award has left undermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred ; or

(*b*) where the award is so indefinite as to be incapable of execution ; or

(*c*) where an objection to the legality of the award is apparent upon the face of it.

(*2*) Where an award is remitted under sub-section (*1*) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court :

Provided that any time so fixed may be extended by subsequent order of the Court.

(*3*) An award remitted under sub-section (*1*) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

Judgment in terms of award.

17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment

so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

Power of Court to pass interim orders.

18. (*1*) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(*2*) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

Power to supersede arbitration when award becomes void or is set aside.

19. Where an award has become void under sub-section (*3*) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

CHAPTER III

Arbitration with Intervention of a Court where there is no Suit Pending

Application to file in Court arbitration agreement.

20. (*1*) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(*2*) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(*3*) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(*4*) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator

appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(*5*) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

CHAPTER IV

Arbitration in Suits

Parties to suit may apply for order of reference.

21. Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.

Appointment of arbitrator.

22. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Order of reference.

23. (*1*) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(*2*) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

Reference to arbitration by some of the parties.

24. Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

Provisions applicable to arbitrations under this Chapter.

25. The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter :

Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

CHAPTER V

General

Application of Chapter.

26. Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations.

Power of arbitrators to make an interim award.

27. (*1*) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(*2*) All references in this Act to an award shall include references to an interim award made under sub-section (*1*).

Power to Court only to enlarge time for making award.

28. (*1*) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(*2*) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Interest on award.

29. Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

Grounds for setting aside award.

30. An award shall not be set aside except on one or more of the following grounds, namely :—

(*a*) that an arbitrator or umpire has misconducted himself or the proceedings;

(*b*) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35 ;

(*c*) that an award has been improperly procured or is otherwise invalid.

Jurisdiction.

31. (*1*) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(*2*) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(*3*) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(*4*) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications

arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

Bar to suits contesting arbitration agreement.

32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

Arbitration agreement or award to be contested by application.

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

Power to stay legal proceedings where there is an arbitration agreement.

34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no

sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may take an order staying the proceedings.

Effect of legal proceedings on arbitration.

35. (*1*) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.

(*2*) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

Power of Court where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

36. Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

37. (*1*) All the provisions of the Indian Limitation Act, 1908, shall ally to arbitrations as they apply to proceedings in Court. Limitation.

(*2*) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(*3*) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(*4*) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require,

extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred.

Disputes as to arbitrator's remuneration or costs.

38. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it

thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

CHAPTER VI

Appeals

Appealable orders.

39. (*1*) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order :—

An order—

(i) superseding an arbitration ;

(ii) on an award stated in the form of a special case ;

(iii) modifying or correcting an award ;

(iv) filing or refusing to file an arbitration agreement ;

(v) staying or refusing to stay legal proceedings where there is arbitration agreement ;

(vi) setting aside or refusing to set aside an award ;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(*2*) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council.

CHAPTER VII

Miscellaneous

Small Cause Court not to have jurisdiction over arbitrations save arbitrations in suits before it.

40. A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save on application made under section 21.

Procedure and powers of Court.

41. Subject to the provisions of this Act and of rules made thereunder—

(*a*) the provisions of the Code of Civil procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(*b*) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :

Provided that nothing in clause (*b*) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

Service of notice by party or arbitrator.

42. Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—

(*a*) by delivering to the person on whom it is to be served, or

(*b*) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in British India and registered under Chapter VI of the Indian Post Office Act, 1898.

Powers of Court to issue processes for appearance before arbitrator.

43. (*1*) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(*2*) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Courts.

(*3*) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Power to High Court to make rules.

44. The High Court may make rules consistent with this Act as to—

(*a*) the filing of awards and all proceedings consequent thereon or incidental thereto ;

(*b*) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto ;

(*c*) the staying of any suit or proceeding

in contravention of an arbitration agreement ;

(*d*) the forms to be used for the purposes of this Act ;

(*e*) generally, all proceedings in Court under this Act.

Crown to be bound.

45. The provisions of this Act shall be binding on the Crown.

Application of Act to statutory arbitrations.

46. The provisions of this Act except sub-section (*1*) of section 6 and sections 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

Act to apply to all arbitrations.

47. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

Saving for pending references.

48. The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply.

Repeals and amendments.

49. (*1*) The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

(*2*) The enactments specified in the Fourth Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

THE FIRST SCHEDULE

(*See section 3*)

Implied Conditions of Arbitration Agreements

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.

2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as

aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

7. The award shall be final and binding on the parties and persons claiming under them respectively.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

COMMENTS
ON
THE FIRST SCHEDULE
(The Arbitration Act, 1940)

The first rule of this Schedule calls for no comment, and the second rule refers to "an even number of arbitrators", while the corresponding rule under the Indian Arbitration Act, 1899, provided for reference to two arbitrators. While the English Act requires the arbitrators to appoint an umpire immediately after their appointment, the Indian rule provides for "not later than one month from the latest date of their respective appointments."

The Indian as well as the English statute do

not prescribe any particular method of appointment of umpire under the respective rules, but if any formalities are required by the arbitration agreement, e.g., writing under hands of the arbitrators endorsed on the agreement of submission, they must be complied with : *Bates* v. *Townley*, (1848) 2 Ex. 152. Where such a condition has not been imposed by the submission, a parol appointment will be valid : *Oliver* v. *Collings*, (1809) 11 East, 367.

The English Courts have been so insistent on compliance with the requisites enjoined by the submission that where the submission required the appointment to be made in writing, and endorsement was made by the two arbitrators, but not at the same time, it was held to be invalid : *Lord* v. *Lord*, (1855) 26 L. J. Q. B. 34, but the rigour of this decision was later relaxed by holding that if the arbitrators came to their decision together, their signing on different dates was immaterial : *In re Hopper*, (1867) 36 L. J. Q. B. 97. Rule 3 allows the arbitrators to make their award within four months as against three months provided for by the Indian Arbitration Act, 1899, the time running from the entering on the reference by the arbitrators, or from receipt of notice in writing from any party calling upon them to act, or within such extended time as the Court may allow.

Rule 4 regulates the time of commencement of the umpire's authority, a matter which has already been discussed. This rule lays down the conditions under which the arbitrators may be considered to have disagreed. Where the Schedule has been excluded by the submission

expressly or by necessary implication, then "there is no definite rule relating to the question what constitutes disagreement": *Russell on Arbitration and Award*, 13th Ed., p. 323.

The only rule, which can be formulated from the authority cited by the learned author, is that it is not necessary that the arbitrators or any of them should expressly state that there has been disagreement, and the existence of disagreement may be inferred from the surrounding circumstances of the case.

Rule 5 fixes the time within which the umpire's award has to be made, and rule 6 relates to the conduct of the reference, namely, examination of witnesses, production of documents and the duty of parties to "do all other things which, during the proceedings on the reference, the arbitrators or umpire may require."

As regards the duties of the arbitrators or umpire in connection with proceedings before them, the principal topics have already been expounded, like, (*1*) duty to act fairly and impartially to both sides, (*2*) duty to follow principles of justice (subject to a certain amount of latitude and well established general rules for administration of justice) like, not examining a witness, or receiving any information from a party without knowledge of the other party, not deciding on his own view of what is proper and fair, duty to fix reasonable time and place of hearing, and of granting reasonable postponements of the hearing, of strictly complying with conditions precedent contained in the arbitration agreement for hearing the dispute, etc., duty generally to hear

all relevant evidence tendered, of forming their own judgment etc.

In connection with "other things which the arbitrators or umpire may require", an example may be given of the power of the arbitrator at his discretion to view the premises : *Munday* v. *Black*, (1861) 30 L. J. C. P. 193 and he may call upon the parties to give him facilities for the same. Such a view does not render evidence unnecessary : *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135, except in special cases, of which examples have been given from arbitrations by skilled and experienced experts, e.g., under rules of the Bengal Chamber of Commerce.

The risk involved in improper delegation of duties by arbitrators of closing the case too hastily or proceeding *exparte* without making the intention to do perfectly clear, of taking opinions of lawyers, except under certain safeguards, are matters to which attention has already been drawn.

Rule 7 enacts that "the award shall be final and binding on the parties and persons claiming under them respectively" and Rule 8 relates to costs of the reference and award. All matters relevant under these rules have been disposed of earlier and require no further elucidation.

THE SECOND SCHEDULE

(*See section 41*)

Powers of Court

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

COMMENTS

ON

THE SECOND SCHEDULE

(The Arbitration Act, 1940)

This Schedule which is not to be found in the Indian Arbitration Act, 1899, has been adopted

from the English Arbitration Act, 1934, and sec. 41(*b*) provides that "the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :"

The schedule to the English Arbitration Act, 1934, includes the power of Court for "examination on oath of any witness before an officer of the Court". This power is absent in the schedule to the Indian Arbitration Act, 1940. The officer may be appointed under issue of commission, provided the conditions laid down in that behalf by the Civil Procedure Code, 1908, are complied with. The English Schedule also contains "security for costs" and "the giving of evidence by affidavit".

As regards taking of evidence by affidavits, the Court cannot make an order to that effect in a suit unless it is empowered to do so by the Civil Procedure Code, a power far more limited than that given to the Courts in England by the Schedule to the English Arbitration Act, 1934, and further evidence by affidavits and security for costs are not items in the Schedule, though it mentions "securing the amount in dispute in the reference", which is an item in the English Schedule in addition to "security for costs".

This concludes the discussion of the provisions of the Indian Arbitration Act, 1940, which, as already stated, has been based mainly on the provisions of the English Arbitration Act, 1934.

Some of the provisions of the latter Act, have, however, not been adopted in the Act of 1940, and it must be presumed that this has been deliberately done. For example, sec. 8(*3*) of the English Arbitration Act, 1934, which is omitted in the Indian Act, runs as follows :—

"Where an application is made to set aside an award the Court may order that any money payable by the award shall be brought into court or otherwise secured pending the determination of the application."

An important change in the English Law has been made by sec. 14(*1*) of the Act of 1934, overruling decisions, like, *Jackson* v. *Barry Rail Co.*, (1893) 1 Ch. 238 ; *Ives and Barker* v. *Willans*, (1894) 2 Ch. 478, according to which a party, who knew or ought to have known at the time of the arbitration agreement that the named arbitrator might not be impartial, or had some interest in the subject-matter of the reference, could not subsequently complain of the appointment. Sec. 14(*1*) provides :—

"Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial for leave to revoke the submission or for injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by

reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality."

This provision has been omitted from the Indian Arbitration Act, 1940, the wisdom of which is open to doubt.

THE THIRD SCHEDULE

[*See section 49(1)*]

Enactments repealed

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
1899	IX.	The Indian Arbitration Act, 1899.	The whole.
1908	V.	The Code of Civil Procedure, 1908.	Section 89, clause (*a*) to (*f*) (both inclusive) or sub-section (1) of section 104 and the Second Schedule.

THE FOURTH SCHEDULE

[*See section 49(2)*]

Enactments Amended.

Year. 1	No. 2	Short title. 3	Amendments. 4
1863	XX	The Religious Endowments Act, 1863.	(*a*) In section 16— (*i*) for the words and figures "Chapter VI of the Code of Civil Procedure" the words and figures "Chapter IV of the Arbitration Act, 1940" shall be substituted ; (*ii*) for the words and figure "section 312 of the said Code" the words and figure "section 21 of the said Act" shall be substituted. (*b*) In section 17, for the words and figure "section 312 of the said Code of Civil Procedure" the words and figures "section 21 of the Arbitration Act, 1940" shall be substituted.
1877	I.	The Specific Relief Act, 1877.	In section 21— (*i*) for the words and figure "Code of Civil Procedure and Indian Arbitration Act, 1899" the words and figure "Arbitration Act, 1940" shall be substituted ; (*ii*) after the words "but if any person who has made such a contract" the words "other than an arbitration agreement to which the provisions of the said Act apply" shall be inserted.

Year. 1	No. 2	Short title. 3	Amendments. 4
1908	IX	The Indian Limitation Act, 1908.	In the First Schedule— (*i*) for Article 158 the following shall be substituted, namely :— "158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration. — Thirty days. — The date of service of the notice of filing of the award". (*ii*) in Articles 159 and 179, for the words "same Code" in the first column the words and figure "Code of Civil Procedure 1908" shall be substituted ; (*iii*) for Article 178 the following shall be substituted, namely :— "178. Under the Arbitration Act, 1940, for the filing in Court of an award. — Ninety days. — The date of service of the notice of the making of the award."
1910	IX	The Indian Electricity Act, 1910.	In section 52, for the figure "1899" the figure "1940" shall be substituted.
1913	VII	The Indian Companies Act, 1913.	In section 152— (*i*) for the figure "1899", in both places where it occurs, the figure "1940" shall be substituted ; (*ii*) in sub-section (*3*) the words "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" shall be omitted.

APPENDIX E

THE ENGLISH ARBITRATION ACT, 1889

(52 & 53 Vict. C. 49)

An Act for amending and consolidating the Enactments relating to Arbitration.

[*26th August 1889*]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

References by Consent out of Court.

Submission to be irrevocable, and to have effect as an order of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.

Provisions implied in submissions.

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

Reference to official referee.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

4. If any party to a submission, or any person claiming through or under him, commen-

ces any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matters agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings.

Power to stay proceedings where there is a submission.

5. In any of the following cases ;—

(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :

(*b*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :

(*c*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him :

(*d*) Where an appointed umpire or third arbitrator refuses to act, or is incapable

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties in certain cases to supply vacancy.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a*) If either of the appointed arbitrators refuses to act, or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place ;

(*b*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, [the party who has

appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court or a judge may set aside any appointment made in pursuance of this section.

Powers of arbitrators.

7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(*a*) to administer oaths to or take the affirmations of the parties and witnesses appearing ; and

(*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court ; and

(*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Witnesses may be summoned by subpœna.

8. Any party to a submission may sue out a writ of *subpœna ad testificandum*, or a writ of *subpœna duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Power to enlarge time for making award.

9. The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not.

Power to remit award.

10. (*1*) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(*2*) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Power to set aside award.

11. (*1*) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

(*2*) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

Enforcing award.

12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court.

Reference for report.

13. (*1*) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(*2*) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer in certain cases.

14. In any case or matter (other than criminal proceeding by the Crown),—

(*a*) If all the parties interested who are not under disability consent ; or,

(*b*) If the cause or matter requires any prolonged examination of documents

or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers ; or,

(*c*) If the question in dispute consists wholly or in part of matters of account ;

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

Powers and remuneration of referees and arbitrators.

15. (*1*) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

(*2*) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury.

(*3*) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or a judge.

Court to have powers as in

16. The Court or a judge shall, as to references under order of the Court or a judge,

references by consent.

have all the powers which are by this Act conferred on the Court or a judge as to references by consent out of Court.

Court of Appeal to have powers of court.

17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a judge thereof under the provisions relating to references under order of the Court.

General.

Power to compel attendance of witness in any part of the United Kingdom, and to order habeas corpus to issue.

18. (*1*) The Court or a Judge may order that a writ of *subpœna ad testificandum* or of *subpœna duces tecum* shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

(*2*) The Court or a Judge may also order that a writ of *habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

Statement of case pending arbitration.

19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

Costs.

20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Exercise of powers by masters and other officers.

21. Provision may from time to time be made by Rules of Court for conferring on any master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the Court or a judge.

22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly. Penalty for perjury.

23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which Her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court or a judge to order any proceedings to which Her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of Her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown. Crown to be bound.

24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act. Application of Act to references under statutory powers.

25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act. Saving for pending arbitrations.

26. (*1*) The enactments described in the Second Schedule to this Act are hereby repealed Repeal.

to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(*2*) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

Definitions.

27. In this Act, unless the contrary intention appears,—

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

"Court" means Her Majesty's High Court of Justice.

"Judge" means a judge of Her Majesty's High Court of Justice.

"Rules of Court" means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

Extent.

28. This Act shall not extend to Scotland or Ireland.

Commencement.

29. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

30. This Act may be cited as the Arbitration Act, 1889.

SCHEDULES

THE FIRST SCHEDULE

Provisions to be Implied in Submissions.

(*a*) If no other mode of reference is provided the reference shall be to a single arbitrator.

(*b*) If the reference is to two arbitrators, the arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

(*c*) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

(*d*) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(*e*) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him

may from time to time enlarge the time for making his award.

(*f*) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(*g*) The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

(*h*) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(*i*) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3. c. 15.	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4. c. 42.	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict. c. 126.	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict. c. 66.	The Supreme Court of Judicature Act, 1873.	Section fifty-six, from "Subject to any Rules of Court" down to "as a judgment by the Court," both inclusive, and the words "special referees or." Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict. c. 61.	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

APPENDIX F

THE ENGLISH ARBITRATION ACT, 1934

(24 & 25 Geo. 5, Cap. 14)

An Act to amend the law relating to arbitrations and to make provision for other matters connected therewith.

[*17th May, 1934*]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

General Amendments of the Law relating to Arbitration.

Arbitration agreement not to be discharged by death of party thereto.

1. (*1*) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

(*2*) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

Provisions in case of bankruptcy.

(*3*) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

2. (*1*) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the

said term shall, if the trustee in bankruptcy adopts the contract, be enforceable by or against him so far as relates to any such differences.

(2) Where a person who has been adjudged bankrupt had before the commencement of the bankruptcy become a party to an arbitration agreement and any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which sub-section (1) of this section does not apply, any other party to the agreement or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the Court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and that Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Power of Court where arbitrator is removed or appointment of arbitrator is revoked.

3. (1) Where an arbitrator (not being a sole arbitrator), or two arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the appointment of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference

is or are removed by the Court, the Court may, on the application of any party to the arbitration agreement, either—

(*a*) appoint a person to act as sole arbitrator in place of the person or persons removed ; or

(*b*) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

(*3*) A person appointed under this section by the Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

(*4*) Where it is provided (whether by means of a provision in the arbitration agreement or otherwise), that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

Provisions on the appointment of three arbitrators.

4. (*1*) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment

of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in the foregoing sub-section, the award of any two of the arbitrators shall be binding.

Provisions relating to umpires.

5. (1) The following paragraph shall be substituted for paragraph (*b*) of the First Schedule to the principal Act (which sets out certain provisions which are to be implied in an arbitration agreement unless the contrary intention is expressed therein) :—

> "(*b*) if the reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed" :

and in paragraph (*c*) of section five of the principal Act after the word "arbitrator' there shall be inserted the words "or where two arbitrators are required to appoint an umpire".

(2) At any time after the appointment of umpire, however appointed, the Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter on the reference in lieu of the arbitrators as if he were a sole arbitrator.

Arbitrators and umpires to use due dispatch.

6. (1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) An arbitrator or umpire who is removed by the Court under this section shall not be entitled to receive any remuneration in respect of his services.

(3) Subject to the provisions of sub-section (2) of section ten of the principal Act and to anything to the contrary in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time.

(4) For the purposes of this section the expression "proceeding with a reference" includes, in a case where two arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

Amendment of Sch. 1 of principal Act.

7. The following provisions shall be added at the end of the First Schedule to the principal Act :—

"(*j*) the arbitrators or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land :

"(*k*) the arbitrators or umpire may, if they think fit, make an interim award."

Additional powers of Court.

8. (*1*) The Court shall have, for purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in the First Schedule to this Act as it has for the purpose of and in relation to an action or matter in the Court :

Provided that nothing in the foregoing provision shall be taken to prejudice any power which may be vested in an arbitrator or umpire

of making orders with respect to any of the matters aforesaid.

(2) Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the Court may direct the issue between the claimants to be determined in accordance with the agreement.

(3) Where an application is made to set aside an award the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

Statement of case by arbitrator or umpire.

9. (1) An arbitrator or umpire may, and shall if so directed by the Court, state :—

(a) any question of law arising in the course of the reference : or

(b) an award or any part of an award,

in the form of a special case for the decision of the Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the Court under this section shall be deemed to be a judgment of the Court within the meaning of section twenty-seven of the Supreme Court of Judicature (Consolidation) Act, 1925 (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the Court), but

no appeal shall lie from the decision of the Court on any case stated under paragraph (*a*) of sub-section (*1*) of this section without the leave of the Court of Appeal.

Entry of judgment in terms of award.

10. Where leave is given under section twelve of the principal Act to enforce an award in the same manner as a judgment or order, judgment may be entered in terms of the award.

Interest on awards.

11. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Provisions as to costs.

12. (*1*) Any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void ; and the principal Act shall in the case of an arbitration agreement containing any such provision have effect as if that provision were not contained therein :

Provided that nothing herein shall invalidate such a provision when it is part of an agreement to submit to arbitration a dispute which has arisen before the making of such agreement.

(*2*) If no provision is made by an award with respect to the costs of the reference, any party to the reference may within fourteen days of the publication of the award or such further time as a Court or a judge may direct apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon the arbitrator shall after hearing any party who may desire to be heard amend his award by adding thereto such directions as he may think

proper with respect to the payment of the costs of the reference.

Taxation of arbitrator's or umpire's fees.

13. (*1*) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into Court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

(*2*) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(*3*) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(*4*) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

Power of Court to give relief where arbitrator is not impartial or dispute referred involves question of fraud.

14. (*1*) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be

impartial for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

(*2*) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder.

(*3*) In any case where by virtue of this section the Court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke a submission, the Court may refuse to stay any action brought in breach of the agreement.

Amendment of s. 11 of principal Act.

15. Section eleven of the principal Act (which empowers the Court to remove an arbitrator and set aside an award) shall be amended by the insertion of the words "or the proceedings" after the words "has misconducted himself" in both places where those words occur in the said section.

Miscellaneous.

Limitation of time for commencing arbitration proceedings.

16. (*1*) The statutes of limitation shall apply to arbitrations as they apply to proceedings in the Court.

(*2*) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of the statutes of limitation both as originally enacted and as applying to arbitrations, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(*3*) In sub-sec. (*3*) of section four hundred and ninety-six of the Merchant Shipping Act, 1894 (which requires a sum deposited with a wharfinger by an owner of goods to be repaid unless legal proceedings are instituted by the shipowner), the expression "legal proceedings" shall be deemed to include arbitration.

(*4*) For the purpose of this section and for the purpose of the statutes of limitation as applying to arbitrations and of the said section four hundred and ninety-six of the Merchant Shipping Act, 1894, as amended by this section, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party or parties a notice requiring him or them to appoint an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

(5) Any such notice as is mentioned in sub-section (4) of this section may be served either :

(a) by delivering it to the person on whom it is to be served ; or

(b) by leaving it at the usual or last known place of abode in England of that person ; or

(c) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in England ;

as well as in any other manner provided in the arbitration agreement ; and where a notice is sent by post in manner prescribed by paragraph (c), service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

(6) Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section, extend the time for such period as it thinks proper.

(7) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the statutes of limitation for the commencement of proceedings (including arbitration) with respect to the dispute referred.

(8) For the purpose of this section the expression "the statutes of limitation" includes any enactment limiting the time within which any particular proceeding may be commenced.

Application of s. 69 of 22 and 23 Geo. 5, c. 37 to solicitors' costs in arbitrations.

17. Section sixty-nine of the Solicitors Act, 1932 (which empowers a Court before which any proceeding is being heard or is pending to charge property recovered or preserved in the proceeding with the payment of solicitors' costs), shall apply as if an arbitration were a proceeding in the Court, and the Court may make declarations and orders accordingly.

Amendment of s. 16 of Agricultural Holdings Act, 1923. 13 & 14 Geo. 5, c. 9. 51 & 52 Vict. c. 43.

18. The following sub-sections shall be inserted after sub-section (5) of section sixteen of the Agricultural Holdings Act, 1923 :—

"(5A) Sections one hundred and ten, one hundred and eleven and one hundred and twelve of the County Courts Act, 1888 (which provide for the issue of summonses to witnesses in County Court actions and the enforcement of such summonses and the bringing up of prisoners to give evidence in such actions) shall apply to any arbitration under this Act as if that arbitra-

tion was an action or matter in the County Court.

(5*B*) The High Court may order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before any arbitrator appointed under this Act, if the prisoner is confined in any prison under process in any civil action or matter."

Saving for pending arbitrations.

19. Subject as hereinafter provided, the provisions of this Act shall not affect any arbitration which has been commenced within the meaning of section sixteen of this Act before the date on which this Act comes into operation, but shall apply to any arbitration so commenced after the said date under an arbitration agreement made before the said date :

Provided that nothing in this section shall affect the operation of the provisions of this Act amending the Agricultural Holdings Act, 1923.

Application to statutory arbitrations.

20. This Act, except the provisions thereof set out in the Second Schedule to this Act, shall apply in relation to every arbitration under any other Act passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far as this Act is inconsistent with that other Act or with any rules or proceduce authorised or recognised thereby :

Provided that this Act shall not apply to any arbitration to which the principal Act does not apply and no provision of this Act which expressly amends a provision of the principal Act shall apply to any arbitration to which that provision of the principal Act does not apply.

21. (*1*) This Act may be cited as the Arbitration Act, 1934. Short title, interpretation, application, extent, repeal and commencement. 52 & 53 Vict. c. 49.

(*2*) In this Act, unless the context otherwise requires :—

The expression "the principal Act" means the Arbitration Act, 1889 :

The expression "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

(*3*) References in this Act and in the principal Act to an award shall include references to an interim award.

(*4*) This Act shall be construed as one with the principal Act, and the principal Act, the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration (Foreign Awards) Act, 1930, and this Act may be cited together as the Arbitration Acts, 1889 to 1934. 14 & 15 Geo. 5, c. 39. 20 & 21 Geo. 5, c. 15.

(*5*) This Act shall not apply to Scotland or Northern Ireland.

(*6*) The enactments mentioned in the Third Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(*7*) The Act shall come into operation on the first day of January, nineteen hundred and thirty-five.

SCHEDULES

SECTION 8 : FIRST SCHEDULE

Matters in respect of which the Court may make Orders.

(1) Security for costs :

(2) Discovery of documents and interrogatories :

(3) The giving of evidence by affidavit :

(4) Examination on oath of any witness before an officer of the Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction :

(5) The preservation, interim custody or sale of any goods which are the subject matter of the reference :

(6) Securing the amount in dispute in the reference :

(7) The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence :

(8) Interim injunctions or the appointment of a receiver.

SECOND SCHEDULE

Provisions of Act which do not apply Statutory Arbitration.

Sub-section (*1*) of section one.

Section two.

Section three.

Sub-section (*2*) of section eight.

Sub-section (*1*) of section twelve.

Section fourteen.

Section sixteen.

SECTION 20: THIRD SCHEDULE

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
52 & 53 Vict, c. 49.	The Arbitration Act, 1889.	Paragraph (*b*) of section seven; section nineteen; paragraphs (*c*) and (*e*) of the First Schedule, and in paragraph (*d*) of that schedule the words "have allowed their time or extended time to expire without making an award or."
10 & 11 Geo. 5, c. 81.	The Administration of Justice Act, 1920.	Section sixteen.

APPENDIX G

THE ADMINISTRATION OF JUSTICE ACT, 1920

(10 & 11 Geo. V. c. 81)

Power as to appointment of arbitrators where submission provides for three arbitrators.

16. (*1*) Where a submission to arbitration provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the parties, then, unless the submission expresses a contrary intention—

(*a*) If one party fails to appoint an arbitrator for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and the award of the arbitrator so appointed shall be binding on both parties as if he had been appointed by consent.

(*b*) If after each party has appointed an arbitrator the two arbitrators appointed fail to appoint a third arbitrator within seven days after the service by either party of a notice upon them to make the appointment, the Court or a judge may, on an application by the party who gave notice, exercise in the place of the two arbitrators the power of appointing the third arbitrator :

(*c*) If an arbitrator, appointed either by one of the parties, by the two arbitrators, or by the Court or a Judge, refuses to act, or is incapable of acting, or dies, a new arbitrator may be appointed in his place by the party, arbitrator may be appointed in his place by the party, arbitrators, or Court or Judge, as the case may be.

(*2*) The Court or a Judge may set aside any appointment of a person to act as sole arbitrator made in pursuance of this section.

(*3*) This section shall be construed as if it were included in the Arbitration Act, 1889, and that Act shall have effect accordingly.

This Section was enacted to meet the difficulty which arose in England in a case reported in (1890) 25 Q. B. D. 545 (*Smith* v. *Nelson*). Further amendment in the English law was effected by section 4 of the English Arbitration Act, 1934, to meet the difficulty that arose in the case of *United Kingdom* v. *Honston*, (1896) 1 Q. B. D. 567, where there was a reference to three arbitrators and the submission omitted to mention that the decision of two of the arbitrators should be binding.

Section 16 of the Administration of Justice Act, 1920, was replaced by the English Arbitration Act, 1934.

APPENDIX H

THE ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937

ACT VI of 1937

[Passed by the Indian Legislature]

(*Received the assent of the Governor-General on the 4th March, 1937*)

An Act to make certain further provisions respecting the Law of Arbitration in British India.

Whereas India was a State signatory to the Protocol on Arbitration Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in British India ;

And whereas it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in British India, to make certain further provisions respecting the law of arbitration ;

It is hereby enacted as follows :—

Short title, extent and operation.

1. (*1*) This Act may be called the Arbitration (Protocol and Convention) Act, 1937.

(*2*) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(*3*) The provisions of this Act, except this section, shall have effect only from such date as the Governor-General in Council may, by notification in the Gazette of India, appoint in this behalf, and the Governor-General in Council may appoint different dates for the coming into effect of different provisions of the Act.

Interpretation.

2. In this Act "foreign award" means an award on differences relating to matters considered as commercial under the law in force in British India, made after the 28th day of July, 1924,—

(*a*) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(*b*) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Governor-General in Council, being satisfied that reciprocal provisions have been made, may, by notification in the Gazette of India, declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(*c*) in one of such territories as the Governor-General in Council, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Act an award shall

not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Stay of proceedings in respect of matters to be referred to arbitration.

3. Notwithstanding anything contained in the Indian Arbitration Act, 1899, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings ; and the Court unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

Effect of foreign awards.

4. (*1*) A foreign award shall, subject to the provisions of this Act, be enforceable in British India as if it were an award made on a matter referred to arbitration in British India.

(*2*) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of

defence, set off or otherwise in any legal proceedings in British India, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Filing of foreign award in Court.

5. (*1*) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(*2*) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(*3*) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Enforcement of foreign award.

6. (*1*) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(*2*) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Conditions for enforcement of foreign awards.

7. (*1*) In order that a foreign award may be enforceable under this Act it must have—

(*a*) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,

(*b*) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(*c*) been made in conformity with the law governing the arbitration procedure,

(*d*) become final in the country in which it was made,

(*e*) been in respect of a matter which may lawfully be referred to arbitration under the law of British India,

and the enforcement thereof must not be contrary to the public policy or the law of British India.

(*2*) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that—

(*a*) the award has been annulled in the country in which it was made, or

(*b*) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

(*c*) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the

giving of such security by the person seeking to enforce it as the Court may think fit.

(*3*) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clauses (*a*), (*b*) and (*c*) of sub-section (*1*), or the existence of the conditions specified in clauses (*b*) and (*c*) of sub-section (*2*), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence.

8. (*1*) The party seeking to enforce a foreign award must produce—

(*a*) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made ;

(*b*) evidence proving that the award has become final ; and

(*c*) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (*a*), (*b*) and (*c*) of sub-section (*1*) of section 7 are satisfied.

(*2*) Where any document requiring to be produced under sub-section (*1*) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified

as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in British India.

9. Nothing in this Act shall— Saving.

(*a*) prejudice any rights which any person would have had of enforcing in British India any award or of availing himself in British India of any award if this Act had not been passed, or

(*b*) apply to any award made on an arbitration agreement governed by the law of British India.

10. The High Court may make rules consistent with this Act as to— Rule-making powers of the High Court.

(*a*) the filing of foreign awards and all proceedings consequent thereon or incidental thereto ;

(*b*) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act ; and

(*c*) generally, all proceedings in Court under this Act.

THE FIRST SCHEDULE

Protocol on Arbitration Clauses.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions :

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken

in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said Article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced

by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories ; that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary-General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE SECOND SCHEDULE

Convention on the Execution of Foreign Arbitral Awards.

Article 1.—In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary :

(*a*) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto ;

(*b*) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon ;

(*c*) That the award has been made by the Arbitral Tribunal provided for in the

submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure ;

(*d*) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending ;

(*e*) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2.—Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied :

(*a*) That the award has been annulled in the country in which it was made ;

(*b*) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case ; or that, being under a legal incapacity, he was not properly represented ;

(*c*) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions

on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3.—If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (*a*) and (*c*) and Article 2(*b*) and (*c*), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4.—The party relying upon an award or claiming its enforcement must supply, in particular :

(*1*) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made ;

(*2*) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(*d*), in the country in which it was made ;

(*3*) When necessary, documentary or other evidence to prove that the

conditions laid down in Article 1, paragraph 1 and paragraph 2(*a*) and (*c*), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5.—The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6.—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

Article 7.—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the

League of Nations, who will notify such deposit to all the signatories.

Article 8.—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9.—The present Convention may be denounced on behalf of the Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article 10.—The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or terri-

tories to which the Protocol on Arbitration Clauses opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies such denunciation.

Article 11.—A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

APPENDIX I

Arbitration (Foreign Awards) Act, 1930

(20 Geo. 5, c. 15.)

CHAPTER XV

An Act to give effect to a certain convention on the execution of Arbitral Awards and to amend sub-section (1) of section one of the Arbitration Clauses (Protocol) Act, 1924.

(*6th February, 1930*)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PART I

Enforcement of Foreign Arbitral Awards

Whereas a Convention, set out in the Schedule to this Act, on the Execution of Arbitral Awards was on the twenty-sixth day of September, nineteen hundred and twenty-seven, signed at Geneva on behalf of his Majesty :

And whereas it is expedient that such provisions should be enacted by Parliament as will enable the said Convention to become operative in the United Kingdom :

Now, therefore, be it enacted as follows :

1. (*1*) This part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty-four— Application of Part I

14 & 15 Geo. 5. c. 39.

(*a*) in pursuance of an agreement for arbitration to which the Protocol set out in the Schedule to the Arbitration Clauses (Protocol) Act, 1924, applies ; and

(*b*) between persons of whom one is subject to the jurisdiction of some of such Powers as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be parties to the said Convention, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid ; and

(*c*) in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said Convention applies ;

and an award to which this Part of this Act applies is in this Act referred to as "a foreign award."

(*2*) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

Effect of foreign awards.

2. (*1*) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in England either by action or under the provisions of section twelve of the Arbitration Act, 1889.

52 & 53 Vict. c. 49.

(*2*) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accord-

ingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in England, and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Conditions for enforcement of foreign awards.

3. (*1*) In order that a foreign award may be enforceable under this Part of this Act it must have—

(*a*) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed ;

(*b*) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties ;

(*c*) been made in conformity with the law governing the arbitration procedure ;

(*d*) become final in the country in which it was made ;

(*e*) been in respect of a matter which may lawfully be referred to arbitration under the law of England ;

and the enforcement thereof must not be contrary to the public policy or the law of England.

(*2*) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that—

(*a*) the award has been annulled in the country in which it was made ; or

(*b*) the party against whom it is sought

to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented ; or

(*c*) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration :

Provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(*3*) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (*a*), (*b*) and (*c*) of sub-section (*1*) of this section, or the existence of the conditions specified in paragraphs (*b*) and (*c*) of sub-section (*2*) of this section, entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the awards annulled by the competent tribunal.

Evidence.

4. (*1*) The party seeking to enforce a foreign award must produce—

(*a*) the original award or a copy thereof authenticated in manner required by

the law of the country in which it was made ; and

(*b*) evidence proving that the award has become final ; and

(*c*) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (*a*), (*b*) and (*c*) of sub-section (*1*) of the last foregoing section are satisfied.

(*2*) In any case where any document required to be produced under sub-section (*1*) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of England.

(*3*) Subject to the provisions of this section, rules of Court may be made under section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.

15 & 16. Geo. 5. c. 49.

5. For the purposes of this Part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Meaning of "final award".

6. Nothing in this Part of this Act shall—

Saving.

(*a*) prejudice any rights which any person would have had of enforcing in Eng-

land any award or of availing himself in England of any award if this Part of this Act had not been enacted ; or

(*b*) apply to any award made on an arbitration agreement governed by the law of England.

Application to Scotland and Northern Ireland.

7. (*1*) In the application of this Part of this Act to Scotland, the following modifications shall be made :—

(*a*) For the references to England there shall be substituted references to Scotland ;

(*b*) The following shall be substituted for sub-section (*1*) of section two :—

"(*1*) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable by action, or if the agreement for arbitration contains consent to the registration of the award in the Books of Council and Session for execution and the award is so registered, it shall, subject as aforesaid, be enforceable by summary diligence" :

(*c*) The following shall be substituted for sub-section (*3*) of section four :—

"(*3*) The Court of Session shall, subject to the provisions of this section, have power to make rules by Act of Sederunt with respect to the evidence which must be furnished by a party seeking to enforce in Scotland an award under this Part of this Act."

(2) In the application of this Part of this Act to Northern Ireland, the following modifications shall be made :

(a) For the references to England there shall be substituted references to Northern Ireland :

(b) The following shall be substituted for sub-sectfon (1) of section two :—

"(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable either by action or in the same manner as the award of an arbitrator under the provisions of the Common Law Procedure Amendment Act (Ireland), 1856" : 19& 20 Vic. c. 102.

(c) For the reference to section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, there shall be substituted a reference to section sixty-one of the Supreme Court of Judicature (Ireland) Act, 1877, as amended by any subsequent enactment. 40 and 41 Vict. c. 57.

PART II

Amendment of Arbitration Clauses (Protocol) Act, 1924, and Short Title.

8. Section one of the Arbitration Clauses (Protocol) Act, 1924 (which provides for the staying of legal proceedings in a court in respect of matters to be referred to arbitration under agreements to which the Protocol applies), shall Amendment of s. 1 of 14 and 15 Geo. 5. c. 39.

have effect as though in sub-section (*1*) thereof after the words "unless satisfied that the agreement or arbitration has become inoperative or arbitration has become inoperative or cannot proceed" there were inserted the words "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred."

Short title.

9. This Act may be cited as the Arbitration (Foreign Awards) Act, 1930.

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